United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MUSIC PRODUCTIONS, INC.,

Intervenor.

Appeal from a Memorandum Opinion and Order of the Federal Communications Commission

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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JOINT APPENDIX

INDEX

[Filed October 22, 1963]

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WAYNESBORO BROADCASTING CORPORATION, Appellant, v. FEDERAL COMMUNICATIONS COMMISSION, Appellee, MUSIC PRODUCTIONS, INC., Intervenor.	Case No. 18,094

PREHEARING STIPULATION

I. The undersigned parties, by their counsel, agree and stipulate that the following issues are presented by the Appeal in this proceeding:

1. Whether the Commission made sufficient and adequate findings upon which to base a conclusion that the application for an extension of time in which to construct Station WBVA should either be granted, designated for hearing, or denied.

2. Whether the Commission's conclusion that the application for an extension of time in which to construct Station WBVA should be granted, was supported by adequate findings and evidence.

3. Whether the Commission should have found and concluded that the application for an extension of time in which to construct Station WBVA was not necessitated by causes beyond the control of the permittee or based upon good cause shown in view of the verified allegations and factual evidence of record.

4. Whether the Commission's failure to conclude that, as a matter of law, Intervenor had abandoned its construction permit, is

contrary to principles established by previous Commission decisions, as well as Decisions of this Court.

5. Whether the Commission should have designated the application for an extension of time in which to construct Station WBVA for evidentiary hearing in order to determine whether the subsequent transfer of 49.5% of the stock of the permittee corporation constituted an unauthorized transfer of control, particularly in view of the verified allegations that Intervenor had (a) first unsuccessfully attempted to sell its construction permit, (b) advised the Commission that the major stockholder of the permittee corporation did then, and does presently, have other commitments which did and will preclude participation in the construction and operation of the station, and (c) following dismissal of the application to sell 100% of the construction permit, transferred 49.5% of the stock of the permittee corporation to a stranger, which person would be the only stockholder with residence in Waynesboro, Virginia.

6. Whether the Commission should have denied or designated for hearing the application for an extension of time in which to construct Station WBVA, in view of the Commission's finding that Intervenor had materially deviated from the terms of a merger agreement previously approved by the Commission, without obtaining prior Commission consent pursuant to the provisions of Section 311(c) of the Communications Act, in order to inquire into all of the circumstances surrounding the transaction involved.

7. Whether, in view of Intervenor's failure to construct the authorized facilities, the verified allegation that its major stockholder represented that he would have no time to devote to the construction or operation of the station, Intervenor's attempt to dispose of the construction permit, and the subsequent transfer of stock in the permittee corporation to a third person, the Commission should have designated the application for an extension of time in which to construct Station WBVA

for hearing to determine whether the various applications and transactions involved constituted an abuse of the Commission's processes, or should have denied the extension application in order to provide an opportunity for other qualified applicants to file for the same or comparable facilities.

II. Counsel for all parties further stipulate and agree that the joint appendix will be filed within 10 days after the filing of the appellant's reply brief, or, if the appellant does not file a reply brief, then within 25 days after the filing of the briefs of appellee and intervenor.

III. Record references in the briefs of the parties will be to the pages of the original record. The pages of the joint appendix will be consecutively numbered and will, in addition, bear appropriate record page numbers so that references to record material printed in the joint appendix may readily be found.

Respectfully submitted,

Keith F. Putbrese
Smith & Pepper
1111 E Street, N. W.
Washington 4, D. C.
Counsel for Appellant
Waynesboro Broadcasting Corp.

Daniel R. Ohlbaum
Associate General Counsel
Federal Communications Commission

William P. Bernton
Colorado Bldg.
Washington 5, D. C.
Counsel for Intervenor
Music Productions, Inc.

[October 22, 1963]

[1]

[Filed October 24, 1963]

Before: Fahy, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38 (k) of the General Rules of this Court, and the stipulation having been considered the stipulation is hereby approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the stipulation and this order shall be printed in the joint appendix herein.

Dated: October 24, 1963.

[1]

[Received Sept. 10, 1963, FCC]

Law Offices of
MALLYCK & BERNTON
621 Colorado Building
Washington 5, D.C.

September 10, 1962

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

In re: Application for Consent to Assign CP
for Station WBVA, Waynesboro, Virginia

Dear Mr. Waple:

Transmitted herewith are three copies of FCC Form 314 to assign the construction permit of Station WBVA, Waynesboro, Virginia, to W. Courtney Evans.

Any correspondence or inquiry in connection with this matter may be directed to the undersigned attorneys.

Very truly yours,

MALLYCK & BERNTON

By /s/E. Theodore Mallyck

Enclosures

FCC Form 314
July 1954
Section I

Form Approved
Budget Bureau No. 52-R027.10

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR CONSENT TO ASSIGNMENT OF RADIO BROADCAST STATION CONSTRUCTION PERMIT OR LICENSE

10261

File No. BAL-607

Name and post office address of assignor (See Instruction A for Part I)

Music Productions, Inc. 2
c/o Mallyck & Bernton
621 Colorado Building
Washington 5, D. C.

GENERAL INSTRUCTIONS

A. This form is to be used in all cases when applying for Authority for Assignment of a Radio Broadcast Station Construction Permit or License. It consists of two parts which are to be completed by the Assignor and the Assignee, respectively.

B. The assignor's part consists of pages 1, 2, and 3 of Section I.

C. The assignee's part consists of pages 4 and 5 of Section I and the following other sections:

Section II, Legal Qualifications of Broadcast Applicant

Section III, Financial Qualifications of Broadcast Applicant

Section IV, Statement of Program Service of Broadcast Applicant

Information requested of the assignee in Paragraphs 1 and 3 of Section III of this application is not required of an assignee of a licensed station but must be furnished by an assignee of a permittee only.

D. Prepare and file three copies of this form and all exhibits and swear to one copy. File with Federal Communications Commission, Washington 25, D. C.

E. Number exhibits serially in the spaces provided in the body of the form. List exhibits furnished by the assignor on page three of this part; list the assignee's exhibits on page five of Part II. Date each exhibit.

F. Information called for by this application which is already on file with the Commission need not be refiled in this application provided (1) the information is now on file in another application or FCC form filed by or on behalf of these applicants; (2) the information is identified fully by reference to the file number (if any), the FCC form number, and the filing date of the application or other form containing the information and the page or paragraph referred to, and (3) after making the reference, the applicants state: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

G. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

INSTRUCTIONS FOR PART I (Assignor)

A. The name of the assignor must be stated exactly as it appears in the authorization to be assigned.

B. This part of this application must be executed by assignor if an individual; by one of the partners of the assignor if a partnership; by an officer of assignor if a corporation or association; or by attorney of assignor only under conditions shown in Section 1.303, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of assignor or his absence from the Continental United States and authority of attorney to act must be submitted with application.

Send notices and communications to the following named person at the post office address indicated:
M. Robert Rogers, c/o Nat'l. Symphony, 2101 16th St., N. W., Washington, D.C. cc: Above.

Name of assignee
W. Courtney Evans

Address of assignee (number, street, city, state)
P. O. Box 669, Seaford, Delaware

1. Authorization which is proposed to be assigned

Call letters	Location
WBVA	Waynesboro, Va.

File number	Date of grant
BP-13714	6/12/61

If license, give expiration date	If construction permit, give date of required completion
NOT APPLICABLE	10/1/62

Authorizations of any Remote Pickup, STL, or other stations which are to be assigned

Call letters	File numbers
NOT APPLICABLE	

2. Is assignor or any person controlling assignor party to any litigation or proceeding which may in any manner affect (or be affected by) the proposed assignment? Yes ☐ No ☒ If so, describe fully

RECEIVED
SEP 10 1961
F. C. C.
OFFICE OF THE SECRETARY

3. Give a full statement of assignor's reasons or purposes for requesting this assignment.

Assignor's principal has accepted employment responsibilities as manager of the National Symphony Orchestra which preclude his devoting time and attention necessary for building station and putting it on the air.

4. Do you propose to request a tax certificate pursuant to Section 112 (m) of the Internal Revenue Code if this proposed assignment is granted? Yes ☐ No ☒ If so, submit as Exhibit No. a brief statement giving the basis for this request.

5. If this application is approved, will assignor upon the settlement date either file with the Commission or furnish to assignee (show which), for the period from the first of the calendar year to the settlement date, the broadcast operating and statistical data relating to the station or stations involved which are called for in Schedules 1 and 2 of the Annual Financial Report (FCC Form No. 324)? Yes ☐ No ☐ NOT APPLICABLE

FCC Form 314 — PART I (Continued) — Section I, Page 4

3. Is the information shown in assignor's Annual Ownership Report now on file with the Commission true and correct as of this date? Yes [X] No [ ]

If the answer is "No", attach as Exhibit No. an Ownership Report supplying full information to bring such data up-to-date.

7. Does the assignor, or any partner, officer, director, member of the assignor's governing board, or any stockholder owning 10% or more of the assignor's stock, have any interest in or connection with the following (if so state what interest or connection):

a. Any standard FM, or television broadcast station?

No

b. Any application pending before the Commission?

No

c. Dismissed and/or denied applications?

No

8. Attach as Exhibit No. 1 a schedule showing the original cost, the original date of purchase, the original cost less depreciation, and the estimated replacement cost for each item listed in Schedule 3 of the Annual Financial Report. (Original Cost means the actual cost to the first person dedicating the property to broadcast service. Original Purchase Date means the date on which the property was first dedicated to broadcast service.) If the information is not available, show why and furnish estimates. If the assignment arises out of death or legal disability of assignor, or is made without valuable consideration for the properties and equipment assigned, the assignor need not supply the information called for in this paragraph. However, the Commission reserves the right to call for information as to the station's technical and non-technical equipment and property.

9. Attach as Exhibit No. 2 a balance sheet showing assignor's present financial condition.

10. Describe fully and give present values of any properties, equipment, or other assets, exempted from, or liabilities not involved in, the proposed assignment together with resulting effect on net worth shown in balance sheet of assignor.

3

See Exhibit 2a.

11. a. Attach as Exhibit No. 3 copies of the contract or agreement to transfer the property and facilities of the station including also but not limited to trusts, leases, debentures, and any other instruments which affect or concern the assignment (See Sec. 1.342 of the Commission's Rules). If there is only an oral agreement, reduce the terms to writing and attach.

b. Is this instrument joined in by assignee? Yes [X] No [ ]

If the answer is "No", explain why the instrument is not jointly executed by assignor and assignee.

c. Show here the consideration (monetary, services, or otherwise) to be paid for the properties, etc., to be transferred and describe terms of payment.

Reimbursement of $5,664.00 and assumption of $6,077.47 for construction permit. Reimbursement of $1,500 and assumption of $3,500 for transmitter site.

The assignor represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.

The assignor, or the undersigned on the assignor's behalf, states that he has endeavored to supply full and correct information as to all matters which are relevant to this application and that he has done so as to all matters within his own knowledge.

Dated this 31st day of August, 1962

Music Productions, Inc.
(Name of assignor)

By R. Albert Hyer
Chairman of the Board
Title

Subscribed and sworn to before me this 31st day of August, 1962

Gretchen R. Doss
Notary Public

(SEAL)
(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state that law does not require seal.)

My commission expires May 31, 1966

FCC Form 314 — PART II (To be completed by ASSIGNEE) — Section I, Page 4

INSTRUCTIONS FOR PART II (Assignee)

A. The name of the assignee, stated in Section I hereof, shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office, and the name of the association. In other sections of the form, the name need be only sufficient for identification of the assignee.

B. This part of this application must be executed by assignee if an individual; by one of the partners of the assignee if a partnership; by an officer of assignee if a corporation or association; or by attorney of assignee only under conditions shown in Section 1.303, Rules Relating to Practice and Procedure, in which event satisfactory evidence of disability of assignee or his absence from the Continental United States and authority of attorney to act must be submitted with application.

C. Before filling out this application, the assignee should familiarize himself with the Communications Act of 1934 and the following parts of the Commission's Rules and Regulations: Part I, Rules Relating to Practice and Procedure; Parts Relating to the Broadcast Services.

Name and post office address of assignee (See Instruction A for Part II)

W. Courtney Evans
Hurley Park Drive
Seaford, Delaware

5

Send notices and communications to the following-named person at the post office address indicated:
W. Courtney Evans
cc: Mallyck & Bernton, Colorado Bldg., Washington 5, DC

1. Give a full statement of assignee's reasons or purposes for requesting this assignment.

Assignee has interests in stations in Delaware and W. Virginia, and desires to expand his holdings in an area convenient to them.

4. a. Will assignee's control over the station, its property and equipment arise out of voluntary agreement with the assignor? If the answer is "Yes", attach three copies of the agreement as Exhibit No. 3, unless heretofore attached in answer to Par. 11a, Part I of Section I hereof. Yes [X] No [ ]

Any contract, lease or other voluntary agreement under which assignee claims control over the station must specifically show (1) assignee will have complete control over all necessary physical property and its use and unlimited supervision over the programs to be broadcast; (2) consideration, whether monetary or otherwise, and whether paid or promised; (3) all other terms and conditions involved in the assignment, including a statement that the instrument submitted covers the entire arrangement between the parties (if it does not, all other pertinent legal instruments must be submitted); (4) assignment is subject to consent of the Commission.

b. Does assignee's control over the station, its property and equipment arise out of involuntary action? If the answer is "Yes", give as Exhibit No. ____ a full narrative statement of the character and status of proceeding (i.e., administration of estate, bankruptcy, dissolution, etc., or operation of law in any other manner), showing all parties thereto, and attach copies of will, letters testamentary, letters of administration, or pleadings and court orders properly certified by the clerk of the court having jurisdiction over the matter. Yes [ ] No [X]

2. What is the name and address of the owner of the station (if other than the assignee)?

Assignee

a. Identify by date and names of parties any contracts entered into by assignor (including those for network service, use of mechanical records, sale of bulk time, etc., filed pursuant to Section 1.342) which will be performed by assignee.

None, except for assumption of liabilities shown in Exhibit 3.

b. If any changes will be made in contracts assumed by assignee, describe fully

The assignee waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests consent to the assignment of this license and/or construction permit in accordance with this application. (See Section 304 of the Communications Act of 1934)

The assignee represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

All the statements made in this part of this application and attached exhibits called for by this part are considered material representations, and all the exhibits are a material part hereof and are incorporated herein as if set out in full in this application.

3. Attach as Exhibit No. 4 a projected balance sheet showing assignee's financial condition after giving effect to the provisions involved in this application as of the same date of the balance sheet submitted in response to Section III, Para. 2, of this application.

[17] EXHIBIT 1

EXPENSES PAID BY MUSIC PRODUCTIONS, INC.

Filing Costs		
Engineering (Silliman, Moffet & Rohrer)		$1,032.00
Legal (Mallyck & Bernton)		850.00
Site Expense		
Civil Engineer	$ 90.00	
Option	300.00	390.00
Paid for withdrawal of competing applications pursuant to FCC approval		2,200.00
Miscellaneous		
Accounting (Burke, Landsberg & Gerber)	$127.00	
Margot Phillips - per diem charges	265.00	
Telephone and Telegraph	50.00	
Transportation (includes pro rata costs of trips from Mexico	750.00	1,192.00
Total		$5,664.00

EXHIBIT 1, page 2

OUTSTANDING OBLIGATIONS OF MUSIC PRODUCTIONS, INC.

Hearing, Engineering (Williams)		$ 850.00*
Legal (Mallyck & Bernton)		
Fees	$4,000.00	
Disbursements	377.47*	4,377.47
James J. Williams, out-of-pocket expenses		650.00*
William Lydle, services re: site and studio		200.00*
Total		$ 6,077.47

The transmitter site is being transferred to the assignee for $5,000.00, which is the price paid for it by Blue Ridge Broadcasting Corporation, a corporation formed for the purpose of acquiring the site.

Items marked with asterisk (*) to be paid by Buyer at settlement - Other item deferred.

[19]

EXHIBIT 2

MUSIC PRODUCTIONS, INCORPORATED
BALANCE SHEET, JUNE 30, 1962
(Unaudited)

CURRENT ASSETS:		
Cash in Bank	$ 2,500.00	
Investment - Blue Ridge Broadcasting Corporation	1,500.00	$ 4,000.00
FIXED ASSETS:		
Furniture and Fixtures (Net after depreciation)	51.25	
Construction Permit Waynesboro, Va.	1.00	
Cost of Franchise	11,740.47	
ORGANIZATION EXPENSE (NET)	86.00	11,878.72
TOTAL ASSETS		$15,878.72
LIABILITIES:		
CURRENT LIABILITIES:		
Accounts Payable, miscellaneous	$ 6,077.47	
Accrued Expenses	150.00	
Loans Payable, M. R. Rogers	2,142.37	8,369.84
LONG TERM LIABILITIES:		
Loans Payable, Stockholders		7,164.00
CAPITAL STOCK:		
1,000 Shares, Common	1,000.00	
Less Accumulated Deficit	655.12	344.88
TOTAL LIABILITIES AND CAPITAL STOCK		$15,878.72

[20]

EXHIBIT 2a

The assignor corporation is not at present actively engaged in any business and has only nominal assets and liabilities apart from those associated with the WBVA construction permit.

However, only those assets and liabilities which are associated with the WBVA construction permit are affected by the proposed assignment; and after consummation of the assignment the remaining assets and liabilities of the corporation will be as follows:

ASSETS:			
Cash in Bank	$ 2,500.00		
Furniture and fixtures (after depreciation)	51.25		
Organization Expenses (net)	86.00		$ 2,637.25
LIABILITIES:			
Accrued expenses	$ 150.00		
Loans payable, M. Robert Rogers	$ 2,142.37	$2,292.37	
CAPITAL STOCK:			
1,000 Shares, Common	1,000.00		
Less: Accumulated Deficit	655.12	344.88	$2,637.25

EXHIBIT A

EXPENSES PAID BY MUSIC PRODUCTIONS, INC.

Filing Costs		
Engineering (Silliman, Moffet & Rohrer)		$1,032.00
Legal (Mallyck & Bernton)		850.00
Site Expense		
Civil Engineer	$ 90.00	
Option	300.00	390.00
Paid for withdrawal of competing applications pursuant to FCC approval		2,200.00
Miscellaneous		
Accounting (Burke, Landsberg & Gerber)	$127.00	
Margot Phillips - per diem charges	265.00	
Telephone and Telegraph	50.00	
Transportation (includes pro rata costs of trips from Mexico	750.00	1,192.00
Total		$5,664.00

[25]

EXHIBIT B

OUTSTANDING OBLIGATIONS OF MUSIC PRODUCTIONS, INC.

Hearing Engineering (Williams)		$ 850.00*
Legal (Mallyck & Bernton)		
Fees	$4,000.00	
Disbursements	377.47*	4,377.47
James J. Williams, out-of-pocket expenses		650.00*
William Lydle, services re: site and studio		200.00*
Total		$ 6,077.47

Items marked with asterisk (*) to be paid by Buyer at settlement - Other item deferred.

[31]

EXHIBIT 5

W. Courtney Evans, the Applicant herein, built WDOW, Dover, Delaware, and operated it from 1948 to 1950 when he sold it for family reasons. He divided the proceeds of the sale with his wife, Elizabeth Evans.

In 1950, Mrs. Evans bought WMRA, Myrtle Beach, South Carolina, and Mr. Evans bought KMMO, Marshall, Missouri. In 1951, Mr. Evans sold KMMO and joined Mrs. Evans at Myrtle Beach. They remained in Myrtle Beach until 1954, when Mrs. Evans sold Myrtle Beach and they returned north.

In 1955, Mr. and Mrs. Evans, as co-partners, put WSUX, Seaford, Delaware, on the air, and they have owned and operated it ever since.

[31]

While the Seaford application was pending, Mr. Evans also filed an application for Salisbury, Maryland. He built this station (WICO) in 1956 but sold it in 1958 when a third station, more powerful than WICO, went on the air in the market and made things difficult for him.

In March 1959, Mr. Evans bought all of the stock of Royal Broadcasting Company, licensee of WVAR, Richwood, West Virginia. He has since transferred 49% to his wife; and they operate WVAR along with WSUX.

[43]

[Received 9/25/62, FCC]

Law Offices of
MALLYCK & BERNTON
621 Colorado Bldg.
Washington 5, D.C.

September 24, 1962

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Re: Transmittal of Application for Additional Time to Construct Station WBVA, Waynesboro, Virginia

Dear Mr. Waple:

Transmitted herewith, on behalf of Music Productions, Inc., is an application for additional time to construct Station WBVA.

Any correspondence or inquiry in connection with this matter should be directed to the undersigned attorneys for the applicant.

Very truly yours,
MALLYCK & BERNTON

By /s/E. Theodore Mallyck

Enclosures

ORIGINAL

FCC Form 701 · Form Approved OCT 7 '62
Budget Bureau No. 52-R070.10

AK PH.

United States of America
Federal Communications Commission

APPLICATION FOR ADDITIONAL TIME TO CONSTRUCT RADIO STATION
(Revised 6-16-48)

File No. BMP-12,581

Name of applicant (See Instruction C)
Music Productions, Incorporated

Post Office address (Number, street, city, state)
c/o Mallyck & Bernton, 621 Colorado Bldg., Washington 5, D. C.

INSTRUCTIONS

A. This form is to be used in all cases when applying for additional time to construct a radio station. It is to be used only by holders of valid radio station construction permits.

B. Prepare and file three copies if for any class of broadcast service; if for a non-broadcast service prepare and file 2 copies. File with the Federal Communications Commission, Washington 25, D. C. (EXCEPTION: If for a Fixed Public Station in Alaska prepare in triplicate and file with Engineer in Charge, Radio District No. 14, Federal Communications Commission, Seattle, Washington.) In all cases swear to one copy and sign all copies.

C. The name of the applicant must be stated exactly as it appears in the construction permit.

D. This application must be executed by applicant, if an individual; by a partner of applicant, if a partnership; by an officer of applicant, if a corporation or association; or by attorney of applicant only under conditions shown in Section 1.303, Rules Relating to Organization and Practice and Procedure, in which event satisfactory evidence of disability of applicant or his absence from the Continental United States and authority of attorney to act must be submitted with application.

E. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

SEP 1962
RECEIVED
FCC

2. Identity of construction permit for which additional time is requested

File Number	Location
BP-13714	Waynesboro, Virginia
Call letters: WBVA	Frequency: 970 kilocycles

3. Reasons why construction cannot be completed within the time specified in construction permit (use back of form)
See Reverse Side

4. If delivery of equipment has not been made, from whom was equipment ordered?
Gates Radio Company

When was equipment ordered?
February 16, 1961

What was the promised date of delivery, if any?
45 days after down payment

5. Has the equipment been delivered? Yes ☐ No ☒

If the answer is "Yes" when was installation commenced?

What is the extent of installation?

Assignor has purchased the transmitter site and has leased studio space.

1. Have there been any changes in the information heretofore submitted by the applicant in the application for construction permit, any amendment thereto, or modification thereof since filing? Yes ☒ No ☐

If the answer is "Yes" give particulars in the space below:

On September 10, 1962, Music Productions, Incorporated filed an application to assign the construction permit for Station WBVA to W. Courtney Evans, File No. BAP-607.

6. By what estimated date can construction be completed? Within 6 months

Dated this 24 day of September 1962

Music Productions, Incorporated
Applicant (See Instruction C)

By W. Robert Rogers

Designate by checkmark below appropriate classification:

☐ Individual Applicant
☐ Member of Applicant Partnership
☒ Officer of Applicant Corporation or Association

Subscribed and sworn to before me this 24th day of September, 1962

SEAL

(Notary public's seal must be affixed where the law of jurisdiction requires, otherwise state that law does not require seal.)

Gretchen R. Doss
Notary Public

My commission expires May 31, 1966

F.C.C. - WASHINGTON, D. C.

[45]

[45]

In February, 1962, Music Productions, Incorporated made its first request for additional time within which to construct Station WBVA. The Commission granted this application on July 17, 1962, and extended the expiration date until October 1, 1962.

However, while the extension application was pending, M. Robert Rogers, applicant's principal stockholder, accepted a position as Manager of the National Symphony Orchestra of Washington, D. C. which made it impossible for him to devote to the station the time required for its construction and initial operation. Accordingly, on September 10, 1962, an application was filed with the Commission to assign the CP for WBVA to W. Courtney Evans (File No. BAP-607). It is anticipated that the Commission will consider this assignment application sometime during the month of October. If the Commission grants its consent to the assignment, the parties anticipate immediate consummation.

Under these circumstances, Music Productions, Incorporated requests an additional six month extension of its CP to enable the assignee, after Commission approval and consummation, to construct and place Station WBVA into operation.

[54]

October 16, 1962

Music Productions, Inc.
Radio Station WBVA
c/o Mallyck & Bernton, Attys.
621 Colorado Building
Washington 5, D. C.

Gentlemen:

Reference is made to your applications (File No. BMP-10581) for extension of time to construct a new standard broadcast station at Waynesboro, Virginia, and (File No. BAP-607) for assignment of the

outstanding permit.

Commission action on your extension application is being withheld pending disposition of the co-pending assignment application.

Very truly yours,

Ben F. Waple
Acting Secretary

cc: Mallyck & Bernton, Attys.

***

[55]

[Received Jan. 25, 1963] Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington 25, D. C.

In re Applications of	)	
	)	
MUSIC PRODUCTIONS, INC.	)	
	)	
For Modification of Construction Permit	)	File No. BMP-10581
	)	
and	)	
	)	
For Assignment of Construction Permit	)	File No. BAP-607

PETITION TO DENY APPLICATIONS

Waynesboro Broadcasting Corporation, licensee of Standard Broadcast Station WAYB, Waynesboro, Virginia, respectfully requests that the above-entitled applications be denied. In support of this request, the following is shown:

Standing

1. Petitioner is the licensee of Standard Broadcast Station WAYB, Waynesboro, Virginia, which operates on the frequency of 1490 kilocycles, with a daytime power of 1 kilowatt, 250 watts nighttime. Station WAYB has been operated in Waynesboro since December of 1947, and the present ownership first acquired an interest in the licensee in 1948, acquiring the complete interest in the licensee in December of 1954.

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2. The community of Waynesboro has a population of 15,694 persons. It has been the policy of the ownership of WAYB to exercise diligent efforts to meet the needs of all of the members, groups and

[56]

organizations of the community and the area served. In this regard, it is pointed out that WAYB does not operate with a specialized programing format in the sense of programing devised to meet special needs of only one or more particular segments of the community, but it has been, and is, the continuing policy of Petitioner to present programs designed to meet the needs of every segment of the community. In the considered and knowledgeable opinion of Petitioner, this has been accomplished. Station WAYB is an integral part of the educational, sociological, cultural, and civic life of the community and area served.

3. Giving due respect to frankness, Petitioner is compelled to point out that its operational policies designed to render a service to meet the tastes, needs and desires of the community is at the expense of a more financially remunerative operation which could otherwise result by yielding to transitory devides, techniques, or programing conducive to more immediate financial return. Its policies are, of course, only possible when broadcast revenues are adequate to sustain that type of public interest operation.

4. Music Productions, Inc. is the permittee of Standard Broadcast Station WBVA which has authorized facilities pursuant to Construction Permit BP-13714 to operate with a daytime power of 500 watts on the frequency of 970 kilocycles (daytime) in Waynesboro. The operation of that station would, of course, be in direct competition with Station WAYB. Station WAYB depends primarily for its economic support and revenue

(over 75%) upon the sale of advertising in Waynesboro and the immediate area. Since WAYB has been operated at only a very moderate profit, the diversion of even a small percentage of the local advertising revenues could cause Station WAYB to be operated at a deficit and, in any event, result in inadequate revenues. Accordingly, it is obvious that the proposed operation would cause WAYB to suffer economic injury. Thus, Petitioner is a "party in interest" as provided in Section 309 (d) (1) of the Communications Act of 1934, as amended, and entitled to file the instant petition in order to demonstrate, as set forth below, that considerations of the public interest require denial of the above-entitled applications. See Atlantic Coast Broadcasting Corp. of Charleston, 22 RR 1045 (1962); WJPB-TV, Inc. 19 RR 1381 (1960); O.R. Mitchell Motors, 14 RR 85 (1956); WMIE-TV, Inc., 11 RR 1091 (1955); Cumberland Valley Broadcasting Co., Inc. 11 RR 840 (1954); Cherry and Webb Broadcasting Co., 9 RR 1093 (1953); Eugene Television, Inc., 9 RR 953 (1953).

5. It is recognized that there is some precedent for the proposition that a Petition To Deny is inapplicable to an application for modification where the modification involves an extension of a construction permit. This would not be applicable here; however, in any event, as recited above, there is ample authority that a Petitioner, having proper legal standing, may properly file a Petition To Deny an assignment or transfer application. In this case, it is apparent that a grant of the requested extension of time in which to complete construction is a condition

precedent to the assignment since the assignment application cannot, of course, be granted should the extension be denied. As pointed out below, the present permittee admittedly has no intention of proceeding

[58]

with the construction or operation of the facilities authorized, but has requested the extension only to preserve the permit for assignment purposes. Accordingly, it is submitted that Petitioner's "standing" should, in any event, extend to the application for an extension of the construction permit as well as to the assignment.

6. In this regard, it should also be noted that, while Petitioner did not object to the initial application for construction permit the proposed assignee involves a totally different party; substantial changes in programing and commercial proposals are involved; the proposed station would be operated under complete absentee ownership -- wherein no familiarity with the community has been demonstrated; and, as pointed out below, substantial questions obtain concerning the qualifications of the proposed assignee.

Background

7. The application of Music Productions, Inc. was filed with the Commission on December 8, 1959 (File No. BP-13714). At that time, the sole stockholders of Music Productions, Inc. were M. Robert Rogers and Thereasa Rogers -- Mr. Rogers held a 60% interest in the applicant, and Mrs. Rogers a 40% interest.

[59]

8. By letter of April 7, 1960, Music Productions, Inc. was advised that it appeared as though its application was mutually exclusive with two other applications proposing substantially the same facilities for Waynesboro (File Nos. 12428 and 13746); an application for improved facilities of Station WDTI in Danville, Virginia (File No. BP-13618); and an application for a new station in Luray, Virginia (File No. BP-13753).

9. The application was amended in March of 1961 to specify certain changes in the financial section of the application; to substitute the engineering section of the mutually exclusive application of James Williams; and to reflect an agreement wherein Music Productions, Inc. was to form a new corporation authorized to do business in Virginia whereby the corporation would, as then constituted, retain 80% of the control of said stock and Mr. Williams would have the right to secure a 20% interest. The agreement was dated February 23, 1961 -- approximately two months after the Commission's December Hearing Order designating all of the above applications for consolidated hearing under Section 307 (b) and standard comparative issues.

10. Music Productions, Inc. advised the Commission that, since a prehearing conference held in January of 1961, Music Productions, Inc. and James J. Williams had agreed to an 80-20 per cent merger, and that Music Productions, Inc. had entered into separate agreements with John Laurino, mutually exclusive applicant for Waynesboro; and Blue Ridge Broadcasters, mutually exclusive applicant for Luray, Virginia -- each of the latter applicants agreeing to dismiss their applications for

partial reimbursement of out-of-pocket expenditures. In connection with the dismissal of the Williams application, it was also recited therein that Mr. Williams would take an active part in the management and ownership of the facility proposed by the merged and amended application. It was further recited that the merger was effected because of the factor of local ownership.

11. The March 13, 1961 Agreement further recited that the consolidation was effected "in order to expedite" the proceeding, and an Affidavit of Williams represented that his rights acquired under

[60]

the merger constituted the "sole consideration" for the merger; that Mr. Williams was "satisfied" with the arrangements of the agreement because it permitted him to "take an active part in the ownership and management" of the proposed station "where I live" while not requiring that he prosecute his own application through the hearing and finance the entire construction and operating costs.

12. By Memorandum Opinion and Order of the Chief Hearing Examiner released April 3, 1961 (FCC 61M 580) the Laurino and Blue Ridge Broadcasters applications were permitted to be dismissed. Thereafter, an Initial Decision was released (April 21, 1961) granting the Music Productions, Inc. application.

13. The Initial Decision in the proceeding became final on June 12, 1961. Under the Commission's Rules, construction should have commenced by mid-August of 1961; construction should have been

[61]

concluded, equipment tests conducted, and an application for license filed prior to February 12, 1962; and, in the event the latter requirement could not be complied with for causes beyond the control of the permittee, or for good cause, an application for extension of the construction permit filed prior to January 12, 1962. The Commission's records will reflect, however, that even an application for an extension of the construction permit was not filed until February 6, 1962. That application merely recited that an effort was made (without describing what effort) to have the station in operation by September of 1961 in time for the "fall upswing in business," but that it proved to be unsuccessful. The application further recited that a "... decision was then made to postpone the construction of the facility until the Spring of 1962" and that it was " . . . anticipated that the station [would]

be constructed and placed into operation sometime [the following] summer." While the application requested an extension to August 1, 1962, the Commission extended the date to October 1, 1962.

14. The assignment of construction permit application which is the subject of this petition (File No. BAP-607) was filed with the Commission on September 10, 1962 -- after the August 1, 1962 date which had been established by the applicant as the target date for completion of construction following the six months extension.

15. The second application for modification of construction permit requesting an extension of time (which application is the subject of this petition) was filed September 25, 1962. The extension requested

is to April 1, 1963. To date that application has not been acted upon by the Commission. The time within which to complete construction has, in fact, expired. In this regard, it is noted that the only basis for the requested extension was to permit the WBVA construction permit to be assigned, and the present permittee to be reimbursed for expenditures to it, to Williams, and for the payments made to the dismissing applicants.

Representations to the Commission

16. As already noted, it was represented to the Commission that the merger agreement was effected "in order to expedite" the proceeding, and the Williams Affidavit further recited that he was satisfied with the arrangements of the agreement because it would permit him to take an active part in the ownership and management of the proposed station while relieving him of the obligation to finance the entire construction and operating costs. The Affidavit also recited

[62]

that the rights acquired under the merger constituted the sole consideration for the merger. Finally, it is noted that the principals of Music Productions, Inc. had considered and implemented the merger with Williams because he liked the idea of having a partner in Waynesboro.

17. Despite the representations first noted above, however, an examination of the applications for extension of the construction permit are demonstrative of a complete lack of diligence in effecting construction and initial operation. To date, no construction has taken place. In addition, relating the reasons given in the application for assignment to the

[63]

prior representations as set forth in the hearing Docket gives rise to an obvious inconsistency. For example, it is recited at Paragraph 3 of Section I of the application that

> "Assignor's principal has accepted employment responsibilities as manager of the National Symphony Orchestra which preclude his devoting time and attention necessary for building station and putting it on the air."

Any consideration of, or reference to, the prior representations by assignor's principal concerning "a partner in Waynesboro" and the representation of Williams that the merger would permit him to take an "active part" in the ownership and management of the proposed station have been completely omitted.

18. Of corollary significance is the representation made that the rights acquired under the merger constituted the "sole consideration" to Mr. Williams. Paragraph 11 (c) of Section I, however, shows that the consideration to be paid in connection with the assignment is the reimbursement of $5,664.00 in expenses, and an assumption of $6,077.47 for the construction permit, together with reimbursement of $1,500.00

and an assumption of $3,500.00 for the transmitter site. Exhibit 1 attached to the assignment application, which reflects the expenses paid by Music Productions in the way of filing costs and miscellaneous costs, recites under "filing costs" the sum of $1,032.00 for engineering costs; $850.00 for legal expenses; and $390.00 for site expenses. The sum of $2,200.00 is listed as consideration which paid for the withdrawal of competing

[64]

applications. The "miscellaneous category" reflects the sum of $1,192.00, $750.00 of which is allocated to transportation costs which includes pro rata costs of trips of assignor's principal from Mexico. Under the outstanding obligations category there are listed hearing engineering expenses for Mr. Williams of $850.00; legal expenses of $4,077.47; and $650.00 is allocated to James J. Williams for out-of-pocket expenditures. A Mr. William Lydle is shown as having an outstanding obligation of $200.00 for services rendered regarding the studio and transmitter site.

19. While the entire listing of expenses lacks details and specificity, it is nevertheless apparent that James J. Williams well-remunerated in the amount of $1,500.00 for expenses which obviously occurred prior to the merger despite the fact that the representation was made in connection with the merger that the "sole consideration" to Williams was the rights acquired by him under the merger.

20. It is apparent from the above that the conduct of the present principals of Music Productions, Inc. has not been consistent with numerous representations made under oath to the Commission. It seems equally apparent that the proposed assignment involves an improper

[64]

consideration which would be in contravention of the Commission's Rules and policies regarding assignment of construction permits.

[65]

Qualifications of Buyer

21. In Paragraph 1 of Section I of Part I, of the assignment application, the assignee gives the following statement of reasons for requesting the assignment:

> "Assignee has interests in stations in Delaware and West Virginia, and desires to expand his holdings in an area convenient to them."

22. Exhibit 5 attached to the application reflects that W. Courtney Evans, the proposed assignee previously had interests in Stations WDOV, Dover, Delaware; KMMO, Marshall, Missouri; and WICO in Salisbury, Maryland. His wife once owned WMRA, Myrtle Beach, South Carolina. As of the present time, Mr. & Mrs. Evans are co-partners in Station WSUX, Seaford, Delaware. Mr. Evans is also majority stockholder of Royal Broadcasting Company, the licensee of Station WVAR, Richwood, West Virginia -- forty-nine per cent of such stock is held by his wife. Accordingly, Stations WVAR and WSUX are obviously the stations referred to in Paragraph 1 of Section I as the stations convenient to Waynesboro.

23. It would appear that the representation concerning the reasons for assignee's interest in acquiring the construction permit herein are misleading and inaccurate. Since at least April of 1962 Station WVAR has been listed with one or more radio brokers as being for sale.

[66]

24. It is additionally pointed out that a review of the various broadcast interests which have been, or presently are, held by Mr. Evans and his wife reflects the following. Mr. Evans built Station WDOV

and operated it from 1948 to 1950, when it was sold for "family reasons." Accordingly, he operated that station for a period of approximately only two years. Despite the fact, however, that the station was sold for "family reasons," during the same year Mrs. Evans bought WMRA and Mr. Evans bought Station KMMO. Station KMMO was sold in 1951 -- approximately one year after its acquisition by Mr. Evans. Mr. Evans then "joined Mrs. Evans at Myrtle Beach." They remained in Myrtle Beach until 1954 when Mrs. Evans sold that station and "they returned north." Accordingly, Station WMRA was held by Mrs. Evans for approximately four years.

25. Station WSUX in Seaford, Delaware, was constructed in 1959 and has been owned and operated ever since by Mr. and Mrs. Evans. While an application was pending for that station, however, Mr. Evans also filed an application for Salisbury, Maryland, and, pursuant to the authorization received, constructed Station WICO in 1956. That station was sold in 1958 -- approximately two years after it commenced operation.

26. It is apparent from the above that Mr. Evans' record of continuity of ownership not only leaves much to be desired, but appears to be in direct contravention of the Commission's policy enunciated in the rule making proceeding which eventually resulted in the establishment

of the so-called three-year rule. At the very least, serious questions are raised concerning Mr. Evans qualifications to become the permittee of Station WBVA.

[67]

28

Public Interest Considerations

27. A grant of the application for an extension of the construction permit and of the application of assignment would be in contravention of significant public interest considerations. As demonstrated above, the principals of Music Productions, Inc. appear to have been something less than totally candid with the Commission. The record of requested extensions is fully reflective of a complete and total lack of diligence in construction endeavor. In fact, no construction has taken place. Moreover, it seems apparent, based upon an analysis of the listing of the moneys to be paid by the assignee that the consideration is improper and in violation of the Commission's Rules.

28. Aside from the qualifications of the assignor, serious questions obtain concerning the qualifications of the proposed assignee. Certainly the record of past transactions involving the proposed assignee raise serious qualification questions. Such questions can only be resolved by an evidentiary hearing. It is pointed out in this regard, however, that actual hearing on the assignment application would not be warranted in the instant case since, under the circumstances reviewed herein, the Commission should deny the request for an extension of the construction permit, which action would render moot consideration of the application

[68]

for assignment.

29. A contrary procedure would result in the incongrous situation wherein there were initially four applications, mutually exclusive, proposing facilities similar to those proposed to be assigned herein, which applications involved the conflicting needs of two separate communities as well as the comparative abilities of the applicants, but, as a result of the dismissals of three of those applications, the Commission

was precluded from making a determination concerning the conflicting needs of the communities involved -- Luray and Waynesboro, Virginia, and precluded from making an evaluation of the comparative merits of the three applicants for Waynesboro.

30. The assignment application, however, would extend this chain of events yet one further step. Under Section 310 of the Communications Act, an assignee or transferee need meet only minimal legal and financial requirements in order to secure Commission approval of the assignment or transfer. There is, of course, no comparative evaluation of one or more applicants. In the instant case, the record of the proposed assignee raises serious questions concerning whether or not said assignee meets even those minimal requirements. Thus, it would appear that the applications involved could result in a grant to an applicant whose qualifications are in doubt, and who, in any event, would not likely prevail in a comparative hearing. Accordingly, it is respectfully

[69]

requested that the Commission deny forthwith the pending application for extension of the construction permit for WBVA and, simultaneously therewith, cancel the outstanding construction permit for Station WBVA, and dismiss, as moot, the pending application for assignment of that construction permit.

Respectfully submitted,

WAYNESBORO BROADCASTING CORPORATION

By /s/ Keith E. Putbrese
Smith & Pepper
Its Attorneys

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[70]

[CERTIFICATE OF SERVICE]

[71]

[Received Feb. 4, 1963, FCC] [71]

Law Offices Of
MALLYCK & BERNTON
621 Colorado Building
Washington 5, D.C.

February 4, 1963

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Re: Request for dismissal of application to assign CP for Station WBVA, Waynesboro, Virginia, File No. BAP-607.

Dear Mr. Waple:

Paragraph 7 of the Agreement for the assignment of the Waynesboro, Virginia construction permit which is the subject of BAP-607, provides that said Agreement can be terminated by either party if the Commission shall not have given public notice of its approval to the assignment within four months of the filing of the assignment application.

The application was filed on September 10, 1962; the four months expired on January 10, 1963; and the assignor has now terminated said Agreement according to its terms.

Under these circumstances the said application should be dismissed.

Very truly yours,
MALLYCK & BERNTON
By/s/ William P. Bernton

[Received Feb. 20, 1963, FCC] [74]

OPPOSITION TO PETITION TO DENY APPLICATIONS

COMES NOW, Music Productions, Inc., (hereinafter referred to as "MPI") and, by its attorneys, files this "Opposition" to the Petition to Deny Applications filed herein by Waynesboro Broadcasting

Corporation. MPI does not contest petitioner's standing but opposes said petition on the following grounds:

I. So much of the petition as relates to the application for assignment of the Waynesboro construction permit to W. Courtney Evans (BAP-607) has been rendered moot by the dismissal of said application.

II. So much of the petition as applies to the extension of time for construction of the proposed station (BMP-10581) is improvidently brought; and

III. The petition sets forth no facts requiring or justifying inquiry or action by the Commission, especially in view of the situation as it now exists.

I.

1. On September 10, 1962, MPI filed with the Commission an application to assign its above construction permit to W. Courtney Evans. The Agreement between the parties provided, in

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paragraph 7 thereof, that either party would have the right to terminate the Agreement if the Commission should not have given public notice of its approval thereto within four months of the date of filing. As the Commission had not yet granted its approval to the assignment by February 4, 1963, MPI notified the Commission by letter of that date that it had elected to terminate the Agreement and that the assignment application should, therefore, be dismissed.

2. Under these circumstances, so much of the petition as relates to the assignment application (BAP-607) is, clearly, moot.

II

3. Insofar as the petition relates to the still pending application for extension of time (BMP-10581), the Commission should dismiss it

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as improperly brought. Congress never intended, and did not create, any statutory right to file petitions to deny with respect to applications for extension of time. Sec. 309(d) of the Communications Act of 1934, as amended, provides that "Petitions to Deny" may be filed only with respect to applications to which subsection (b) of Sec. 309 applies; and subsection (c) of Section 309 clearly states that subsection (b) shall not apply to a petition for extension of time to construct authorized facilities. (See. Sec. 309(c)(2)).

[76]

4. The Commission's Rules exactly parallel the statute in this particular instance. The provisions relating to "Petitions to Deny" are found in subsection (i) et seq. of Sec. 1.359 of the Rules; and applications for extension of time to construct facilities are, again, specifically exempted from all of the provisions of Sec. 1.359 by paragraph 1.359 (a)(4).

5. Since Congress determined that the disposition of applications for extension of time should be a matter solely between the Commission and the applicant, with no right being afforded any party to petition for denial of, or hearing on, such applications, and since the Commission itself created no such rights with respect to such applications, it is clear that the instant petition does not lie with respect to the application for extension of time and may, therefore, be summarily dismissed.

6. Considering the instant petition, as it must, as merely an "informal objection" under Sec. 1.361, the Commission will find nothing established or alleged that warrants denial or delay in granting the requested extension of the MPI construction permit.

III.

7. The basic thrust of the instant petition as it relates to MPI seems to be that there are Commission policies against the payment to

Williams of $1,500, that by proposing to assign the construction permit to a non-resident MPI has shown that its stated reasons for giving Williams an option on 20% of its

[77]

stock (i.e., in order to have a local resident participate in the ownership and management of the proposed station) were, in fact, misrepresentations; and that, by proposing the assignment to Evans, MPI had frustrated the basic policies behind comparative hearings because it would have placed the franchise in the hands of an individual whose qualifications were not before the Commission at the time it made its original grant. Petitioner also argues (at page 8) that "the only basis for the requested extension was to permit the WBVA construction permit to be assigned . . ." None of these claims has any merit whatsoever.

8. As far as the payment to Williams is concerned, it should be noted that he had been a competing applicant for a new station at Waynesboro, whose application was mutually exclusive with that of MPI, and had, with Commission approval, acquired an option to acquire 20% of the stock of MPI in consideration for the dismissal of his application. Mr. Rogers, who was at the time out of the country, had hoped that Mr. Williams would, as "resident partner" take an active part in the operation of the proposed station. However, the Williams' option was never exercised, and the situation with Williams was somewhat complicated by the happenings in and disposition of Docket No. 13262. Notwithstanding the foregoing, no final disposition was required or was made with respect to Williams until the decision was made to assign the construction permit to Mr. Evans, although at that time it became clear that some disposition had to be made with

[77]

respect to his option. Under all the rules and precedents of the Commission Mr. Williams was, and is, as entitled to recoup his bona

[78]

fide expenses as was Mr. Rogers. In addition, Mr. Williams, who is a graduate engineer had prepared and provided the complete set of engineering exhibits (including the showing of other services to the proposed area of service) which had been used by MPI during the hearing; and he was entitled to payment for those services whether or not his option was terminated. Mr. Williams presented a verified statement that his out-of-pocket expenses (including cost of option on his proposed transmitter site) were $675. He placed a figure of $850 as the fair value of his engineering services; and undersigned counsel advised MPI that this was reasonable. Accordingly, an agreement was reached for the surrender of Williams' option in consideration for payment of $1,500 cash. Petitioner has cited no precedent or authority to support its claim that there is anything in this arrangement that in any way violates any rule, precedent or requirement of the Commission; and none can be cited to support that proposal.

9. As noted above, the application to assign the Waynesboro construction permit to Evans was filed with the Commission in September, 1962, and remained pending, without favorable action, for over four months. To the best of the knowledge and belief of undersigned counsel, this delay was occasioned by questions relating solely to Evans, the proposed assignee, which questions were unresolved on January 10 and remain unresolved today. Counsel reported this problem to the principals of MPI, and also informed them that, as of the middle of January, there was no indication when or in what manner these questions would be resolved; and the

[79]

principals of MPI determined at that time that they had no alternative but to terminate the contract. Although Mr. Rogers' continuing commitments to the National Symphony Orchestra would still make it impossible for him to devote significant time to the station, Mrs. Rogers (who had served as assistant manager and station manager of WGMS for a period of eight years) felt that she could assume responsibility for putting the station on the air once she had completed her duties as President and General Manager of the Washington High Fidelity Music Show in early February of this year, so it was decided that MPI would put the station on the air itself.

10. Almost simultaneously with this determination, a wholly unsolicited inquiry was received from Mr. Louis Spilman, Editor and Publisher of The News-Virginian of Waynesboro, and a leading citizen of that community, stating that he would be interested in discussing construction of the station with the owners of the franchise. Mr. Rogers met with Mr. Spilman and they are now finalizing the agreement, the outlines of which are being submitted as an amendment to BMP-10581 simultaneously with the filing of this Opposition.

11. Under this Agreement M. Robert Rogers, who was the controlling stockholder of MPI at the time of the hearing, will continue as controlling stockholder; and the station will also have the substantial and significant participation of a local stockholder who is one of the leading members of the Waynesboro

[80]

community.* At this point, therefore, the instant extension of time is

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being requested not for the purpose of allowing the construction permit to be assigned but solely to give Mr. Rogers and his new local associate an opportunity to go forward with the construction of the station.

12. In this connection it should be noted that this is by no means a situation where no steps have been taken or obligations incurred with respect to construction. MPI has acquired, through a subsidiary, the transmitter site designated in its construction permit and a studio lease. It has paid $1,500 down on said site and has another payment of $1,750, plus interest, coming due in April of this year. The contract for Mr. Spilman's participation calls for a total of in excess of $32,000 new cash to be paid into the corporation at closing, which will be within ten days of Commission approval of the instant application for extension of time; and MPI hereby represents to the Commission that it will thereupon complete construction of its station to get it on the air.

13. Waynesboro has a 1960 census population of 15,694, representing an increase of 27% over its 1950 population. It is becoming a manufacturing center; and its population is expected

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*Since, under this Agreement, Mr. Rogers will retain positive control of the corporation, Commission approval of this transaction is not required, nor does it afford an occasion for filing a Petition to Deny, although the Commission does, of course, have jurisdiction over this proposal by virtue of the pendency of the application for extension of time.

[81]

to continue to increase by virtue of the contemplated location of additional factories there. It has only one station; and the instant proposal will afford the community its first choice of local programming. The transparent attempt of the existing station in Waynesboro to forestall competition from this new station should not be allowed to delay the institution of this additional service to the Waynesboro community.

For all the foregoing reasons the instant petition should be denied.

Respectfully submitted,

MUSIC PRODUCTIONS, INC.

By /s/ William P. Bernton

Mallyck & Bernton
621 Colorado Building
Washington 5, D. C.
Its Attorney

February , 1963

[CERTIFICATE OF SERVICE]

[82]

CERTIFICATE

I certify that the matters and facts set forth in the foregoing Opposition are true to the best of my knowledge and belief.

/s/ M. Robert Rogers

[83]

[Received Feb. 20, 1963, FCC]

Law Offices Of
MALLYCK & BERNTON
621 Colorado Building
Washington 5, D. C.

February 23, 1963

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

Re: Transmittal of Amendment to Application for Additional Time to Construct Station WBVA, Waynesboro, Virginia, File No. BMP-10581.

Dear Mr. Waple:

Transmitted herewith, on behalf of Music Productions, Inc., is an amendment to its above-captioned application for additional time to

[83]

construct Station WBVA.

Any correspondence or inquiry in connection with this matter should be directed to the undersigned attorneys for the applicant.

Very truly yours,

MALLYCK & BERNTON

By /s/William P. Bernton

Enclosure

[84]

[Received February 20, 1963, FCC]

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

In re: BMP-10581
Waynesboro, Va.

Dear Mr. Waple:

Music Productions, Inc., applicant herein, hereby amends its above-referenced application by making the following showing:

1. Between September 10, 1962, and February 4, 1063, applicant had pending as application to assign the instant construction permit to W. Courtney Evans. For reasons beyond the control of applicant, and which applicant is advised related solely to its proposed assignee, the assignment was not granted within the time limited in the assignment Agreement and applicant terminated the Agreement.

2. In addition to the factual material set forth in applicant's Opposition to the Petition to Deny this application filed by Waynesboro Broadcasting Corp., applicant reports that it and its principals are now finalizing an agreement under which Mr. Louis Spilman, Editor and Publisher of the Waynesboro News-Virginia, will acquire 49.5% of the applicant corporation. The mechanism that will be used will be to have Teresa S. Rogers assign all of her stock (40 shares representing 40% of the corporation's issued stock) to her hsuband, M. Robert

Rogers. Mr. Rogers already owns 60 shares, or 60 percent of the corporation's issued stock and is its controlling stockholder; and this will give him ownership of all 100 shares of the corporation's issued stock. Mr. Spilman will then purchase from the corporation 98 shares of its authorized but previously unissued stock. After this transaction, Mr. Rogers will own 100/198ths, or 50.5% of the corporation's issued stock and will still be its controlling stockholder. Since no transfer of affirmative or negative control is involved, no formal application will be filed with the Commision in connection with this transaction although the Commission does, of course, have jurisdiction over it by virtue of the pendency of this application for extension of time.

[85]

3. Mr. Spilman will pay for his stock an amount approximately equal to the verified bona fide expenses heretofore actually paid by the applicant in the preparation and prosecution of its application, all of which are reflected in the exhibits appended to the Agreement of August 31, 1962, between MPI and W. Courtney Evans.*

4. In addition, Mr. Spilman will lend the corporation $16,666 on ten year, 6% notes, and Mr. Rogers will lend the corporation $8,333 on the same terms. Thus, the corporation will have new cash in excess of $32,000 at settlement under the Agreement with Mr. Spilman, which settlement will take place within ten days after Commission approval of the instant application. Construction of the station will be completed immediately thereafter with a view to getting the station on the air.

Very truly yours,
MUSIC PRODUCTIONS, INC.
By /s/M. Robert Rogers

Dated: February 15, 1963

*Since these expenses will represent 50.5% of the total investment and Mr. Spilman is only acquiring 49.5% of the corporation's stock, Mr. Spilman's cash investment for his stock will, in fact, be proportionately less than the total expenses previously paid. Thus, neither MPI nor Mr. Rogers will realize any profit on the transaction.

[88]

February 27, 1963

8720

Music Productions Incorporated
Radion Station WBVA
c/o Mallyck & Bernton
621 Colorado Building
Washington 5, D. C.

Re: BAP-607
Station WBVA

Gentlemen:

In accordance with request and information contained in letter dated February 4, 1963 from your attorney, William P. Bernton, Esquire, your application, File No. BAP-607, requesting the Commission's consent to the voluntary assignment of construction permit for Radio Station WBVA, Waynesboro, Virginia to one W. Courtney Evans is being dismissed without prejudice as of this date. This is in accordance with the provisions contained in Section 1.312(a) of the Commission's Rules and Regulations.

Very truly yours,

Ben F. Waple
Acting Secretary

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[91]

[Received March 5, 1963, FCC]

REPLY TO OPPOSITION TO PETITION TO DENY APPLICATIONS

Waynesboro Broadcasting Corporation (Petitioner), licensee of Standard Broadcast Station WAYB, Waynesboro, Virginia, respectfully submits its Reply to the Opposition to Petition to Deny Applications filed

on behalf of Music Productions, Inc. (MPI) on February 15, 1963.

Preliminary

1. The MPI Opposition relates to a Petition to Deny Applications filed on behalf of Petitioner on January 25, 1963. That Petition was directed against (a) a pending application for modification of construction permit (File No. BMP-10581) filed on behalf of MPI requesting an extension of its outstanding construction permit for WBVA and, (b) a related application of MPI, requesting consent to the assignment of that construction permit to W. Courtney Evans (File No. BAP-607). WBVA now asserts that, while

[92]

it does not contest Petitioner's standing to file that petition, so much of the petition as relates to the application for assignment of the construction permit has been rendered moot by dismissal of the application. WBVA then asserts that Commission procedures do not provide for the filing of petitions to deny applications for extension, of construction permits and that, accordingly, the petition must be denied.

2. Petitioner recognizes, of course, that dismissal of an application which is the subject of a Petition to Deny would normally render moot the questions raised. Not so here, however, because of (a) the continued pendency of the application for extension, (b) the effort to, in fact, nevertheless transfer the construction permit, (c) the public interest considerations involved and, (d) the substantial questions which obtain concerning MPI. It is submitted that, upon the basis of the information set forth in the application for extension alone, the application must be denied. At the least, it must be designated for hearing and, in so doing, issues specified in the Hearing Order which would permit inquiry into a corollary question whether there has been an abuse of the Commission's processes.

[92]

Commission Jurisdiction

3. Despite the dismissal of the assignment application, the Commission obviously has the authority to deny or designate for hearing the application for extension. In so doing, the Commission may and should

[93]

take into consideration the circumstances surrounding the filing[1/] and dismissal of the assignment application, including the concurrent attempt to transfer the permit to still another party.

Further Attempt To Transfer

4. The position of MPI that there is no longer an application for the Commission to pass upon is an obvious sham. Such an assertion must, at the very least, be considered frivolous. The application for assignment of the construction permit to W. Courtney Evans recited, under oath, that assignor's principal had accepted employment responsibilities as manager of the National Symphony Orchestra ". . . which preclude his devoting time and attention necessary for building station and putting it on the air." By the same token, the application for a further extension of the construction permit recited that the commitments of the permittee "made it impossible" to devote the time required for construction and operation of WBVA. It is further recited therein that "accordingly, on September 10, 1962" the application was filed to assign the permit.

5. It becomes even more obvious that the extension was requested solely for the purpose of permitting the permittee to assign the permit when the concluding paragraph of the reasons for the requested transfer are examined. It is stated that "under these circumstances" MPI

requests

1/ Including the negotiations leading up to the filing and the time such negotiations were instituted.

[94]

an additional six months extension. As the Commission is well aware, the application for a further extension was filed after the application for assignment was filed.

6. That the permittee has no intention of constructing or operating the station cannot then be disguised by the fact that, following dismissal of the attempt to assign the entire construction permit, the permittee entered into an agreement with an entirely different person wherein said person is to acquire 49.5 percent of the stock in the permittee corporation. In so doing, MPI stated that "the mechanicism that will be used" will be to have Mrs. Rogers assign all her stock to Mr. Rogers.2/ The "mechanicism" used is that the proposed 49.5 percent stockholder (Mr. Spilman) would purchase from the corporation 98 shares of its authorized (but previously unissued) stock. This results in Mr. Rogers holding 50.5 percent of the corporation's issued stock and Mr. Spilman holding 49.5 percent.

7. At no time has MPI been able to assert that there has been any changes in Mr. Rogers commitments which would now make it possible for him to construct and operate the station.

8. Whether or not such is the case is, however, beside the point in any event. An examination of the financial arrangements pertaining to the transfer of 49.5 percent of the stock to Mr. Spilman conclusively delineates the fact that the full financial responsibility for the construction

2/ Mr. Rogers was the principal stockholder holding 60 percent of the corporation's issued stock. Mrs. Rogers held the remaining 40 percent.

[95]

and operation of the station will be Mr. Spilman's. For example, MPI has recited that Mr. Spilman will pay for his stock an amount approximately equal to the verified bonafide expenses paid by MPI in connection with the preparation and prosecution of its application. Paragraph 11 (c) of Section I of the now-dismissed assignment application recites that the total expenses were $16,741.47. Thus, the acquisiton of 49.5 percent of the stock would represent a consideration of approximately $8,333.00. This is identical to the amount that Mr. Rogers had agreed to lend the corporation for construction and initial operating costs. By the same token, however, Mr. Spilman has agreed to lend the corporation $16,666.00.

9. It is thus apparent that Mr. Rogers will, in fact, put no additional capital into the corporation. The entire financial responsibility will be, in fact, the responsibility of the 49.5 percent stockholder who will, in effect, put $25,000.00 into the corporation. Only by the greatest stretch of the imagination may it be hypothesized that the actual control will not reside in Mr. Spilman. Accordingly, as previously noted, it is apparent that the transfer of only 49.5 percent of the stock merely represents a thinly disguised effort to avoid the filing of an application for assignment or transfer as would be required should there be an actual change in control of the voting stock. There is, of course, ample Commission precedent for the proposition that control may be assumed, relinquished or transferred by means other

than an actual transfer of voting stock.

[96]

Precedent Requires Denial
Of The Requested Extension

10. Aside from the attempts to assign or transfer control of the corporation and aside from misleading representations made to the Commission, based upon legal considerations and precedent alone, the application for extension of the construction permit must be denied. The Initial Decision in the hearing proceeding involving the application became final on June 12, 1961. Construction should have commenced by mid-August of 1961; construction should have been concluded and an application for license filed prior to February 12, 1962 -- over one year ago; and, an application for extension of the construction permit filed prior to January 12, 1962 if construction could not be completed within the time prescribed by law. Such an extension was not, however, filed until February 6, 1962. While this first application for extension recited that an "effort" was made to have the station in operation by September of 1961, the Commission is advised that no construction, in fact, took place.[3/] Thus, the effort did more than prove "to be unsuccessful," as was recited in the application. The application for extension also recited that a decision was made to postpone construction until the spring of 1962, but it was anticipated that the station would be placed into operation sometime the following summer. Based upon those representations an extension was granted to October 1, 1962.

4/ While land was acquired, this was accomplished well in advance and merely represents a saleable investment.

[97]

11. Despite those representations, however, no construction took place -- nothing further was done -- and it was not until September 25, 1962, that even an application for a further extension of the completion date was filed. This second request for an extension was filed after the date which had been represented as the target date for completion of construction following the first six months extension.

12. The second application for an extension of the construction permit was also filed 15 days after the application for assignment of construction permit was filed. Obviously, the only purpose for requesting the second extension was to permit the assignment of the construction permit. That such is the case is even obvious from a reading of the reasons given in support of the request.

13. Section 319(b) of the Communications Act provides as follows:

"Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forefeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."

14. Section 1.313 of the Commission's Rules provides that:

"A construction permit shall be automatically forefeited if the station is not ready for operation within the time specified therein or within such further time as the Commission may have allowed

[98]

for completion, and a notation of the forefeiture of any construction permit under this provision will be placed in the records of the Commission as of the expiration date."

15. Section 1.314 provides that:

"Each construction permit will specify a maximum of 60 days from the date of granting thereof as the time within which construction of the station shall begin and a maximum of six months thereafter as the time within which construction shall be completed and the station ready for operation, unless otherwise determined by the Commission under proper showing in any particular case."

16. What constitutes proper showing must be determined, in part, by an analysis of case precedent. In the case of Wrather-Alvarez, 17 RR 670 (1959), the applicant for an extension of time to construct a television station at Yuma, Arizona, had held the construction permit from January 25, 1956, until March 25, 1957, without commencing construction. The Commission designated the application for hearing on the following issues: (1) To determine whether there had been a diligent effort to construct the facilities authorized by the permit, (2) To determine whether the applicant was prevented from commencing construction by causes not under its control and (3) To determine whether an extension would serve the public interest.

17. The permittee had originally been granted a six-month extension because shortly after the Commission had granted the

application, the applicant had encountered certain unforeseen difficulties with his antenna site. Because of an erroneous map, it was later discovered that road access to the site was unavailable. Likewise, electric power that was available at the site would require new feeder lines. Because of this, the applicant had made engineering studies of the possibility of relocating the antenna site to a place which not only met the engineering requirements, but enabled the

[99]

applicant to provide Grade A coverage not only to Yuma, but also to El Centro as well. The six-month extension, however, was declared necessary because the daytime temperatures were such as to make it impossible for anyone to work. In February, 1957, the applicant filed a petition to amend the Commission's Table of Television Channel Assignments to reassign Channel 13 to El Centro, California by its deletion from Yuma, Arizona.

18. Four days later, it filed its second application for additional time to construct the station at Yuma. Its supporting statements were directed primarily toward the desirability of relocating the site to El Centro. The applicant's concluding statement was to the effect that it should not be compelled to go forward with the construction at the present site when there was a reasonable possibility that the Commission would act favorably upon its request for reassignment of the Channel to El Centro.

[100]

19. After response to the applicant's petition for rulemaking, by the Commission, inviting views and comments on the proposal, the Commission did not take any action on the applicant's second request for an extension of time until October 9, 1957 when it advised the applicant that the construction permit would be cancelled unless a hearing were held. Concluding the hearings, the Commission ruled that the second application for an extension of time would be denied because the construction seemed to be delayed primarily by the permittee's efforts to move the channel to a more attractive location.

20. It is noted that the Commission also gave considerable weight to the fact that no physical construction had taken place, pointing out that this is a factor to take into consideration in determining whether there has been a bonafide attempt to comply with the

requirements of the permit. In this regard, it is noted that the case is otherwise almost identically on point -- even including the time periods involved -- except that, in that case, at least the applicant did not also envision divesting himself of the construction permit.

21. Wilmington Television Corporation, 12 RR 187 (1956). On February 17, 1954, the Commission granted a construction permit to construct a television station at Wilmington, North Carolina. Construction dates specified in the permit were April 17, 1954 for commencement of construction, and October 17, 1954 for completion. On September 15, 1954, applicant requested an extension of time in which to complete

[101]

construction; however, the application was designated for hearing (February 16, 1959) on issues similar to those enumerated in the preceding case.

22. As evidence of diligence in proceeding with construction, a principal of the permittee testified that part of a building which he himself owned had been reserved for studio space for the station and that he had purchased some paint, lumber, and other materials for remodeling. A new generator for the building's elevator had been purchased in anticipation of increased traffic. Beyond this, little of the work went beyond the planning stage. The applicant had done nothing with respect to purchasing its antenna, transmitter, or other related television equipment pursuant to the specifications of the construction permit. No persons had been hired for its proposed staff and no definite plans for local live programing had been prepared. Attempts at network affiliation were made, but without success because of CBS' dissatisfaction with respect to profit prospects.

[101]

50

23. As justification for its failure to start constructing its studios prior to the hearing the applicant stated that until the question of network affiliation had been determined, it would not know what type of studio to build. Further, as justification for its failure to construct the station and its failure to purchase or order a transmitter and other technical equipment prior to the hearing, the applicant stated that it then desired to purchase and install a 5 kilowatt transmitter rather than a 2 kilowatt transmitter authorized in the construction permit.

[102]

24. Taking into consideration all of the permittee's attempts at construction, the Commission concluded that an insufficient showing of diligence had been made and that the public interest would not be served by granting the requested extension.

25. City of Jacksonville, Florida, 5 RR 1357 (1959). The City of Jacksonville was issued a construction permit for WJAX-TV on August 18, 1948, which required that construction be commenced by October 18, 1948, and completed by April 18, 1949. On March 31, 1949, an application for an extension of time was filed. The application was designated for hearing to (1) Determine whether the applicant had been diligent in proceeding with construction, and (2) To determine whether it would be in the public interest to grant the application.

26. The applicant's plan for financing the construction of the television station was through the issuance of $300,000 worth of revenue certificates. It was later decided that at least $500,000 would be necessary and the city sought legislative authority to increase the amount of revenue certificates. The Bill was presented to the State Legislature by the city in March of 1949, but it was not until May 28, of that year, or after the construction of the station was to have been

completed, that the Bill finally became law. Applicant urged this as ground for the requested extension of time.

27. As indication of its diligence, the city cited the fact that it had incurred expenses of $4,300.00 in modifying its radio tower to support

[103]

the television antenna; it had cleared a site for the antenna and transmitter house; architect's plans had been drawn for a transmitter building; a list of necessary equipment had been made; an investigation of the availability of such equipment was made; and, tentative arrangements for affiliation with NBC had been made.

28. Rejecting the applicant's claim that, as a municipal corporation it was entitled to different considerations than that of an individual or corporate permittee, the Commission held that the applicant had not displayed due diligence in proceeding with construction, and that the delays in construction were not the result of causes not under the control of the permittee. The application was denied.

29. Maison Blanche Company (WRTV), 5 RR 595 (1949). The applicant had been granted a construction permit on January 16, 1947. The first and second applications for extension of time were granted on May 9, 1947 and April 18, 1948. A third extension was requested. As justification therefor, the applicant testified that it was disturbed about the certainties of the future of television and that it wanted to determine whether or not it could expect a reasonable return on its investment, before embarking on construction. The applicant frankly admitted that there was no definite decision to build the station, but that it would like to have the frequency "earmarked"

[103]

for its use in the event that the Board of Directors of the applicant decided to go ahead with building the station. No construction of the station had been started, and the applicant's contract to purchase equipment from Dumont

[104]

was conditioned upon its decision to definitely proceed with construction. Accordingly, while the first application for extension of time had been granted because of the unavailability of equipment and the second extension granted because of changes in the type of transmitting apparatus to be used, the Commission refused to accept the applicant's reasons for a third extension of time and denied the application.

30. Raytheon Manufacturing Company, 5 RR 389 (1949). In this case an application for extension of time was denied by the Commission where the applicant, after having received two previous extensions had failed to secure a satisfactory transmitter site over a period of a year after failure of negotiations for the purchase of the first site proposed. The Commission also held that deterioration of the permittee's financial condition was not a good reason, nor was the failure of the permittee to complete manufacture of its own equipment an excuse for delay. Allegations of inability to obtain capital were also held not to constitute justification for the delay since the permittee was able to finance the construction itself. Finally, the fact that the permittee planned to integrate its station with a microwave relay link to be completed between New York and Boston was held not to constitute good cause and the Commission denied the application on the ground that all of the causes of delay were within the control of the applicant.

31. In Magic City Broadcasting Corporation (Docket No. 14554; File No. BMP-10258); Hearing Order released February 8, 1963 (FCC 63 114),

the Commission's Hearing Order specified issues which require a determination of the good faith of the applicants in connection with representations previously made to secure prior extensions in addition to the standard diligence issues. It is submitted that such a procedure is required in this proceeding as well, particularly in view of (a) the apparent fact that negotiations to sell the construction permit were well underway prior to the filing of at least the second requested extension and, (b) the fact that the subsequent transfer of less than controlling stock (49.5%) is an obvious sham to avoid the filing of an assignment application.

32. In Central Wisconsin Television, Inc. (Docket No. 14933 File No. BMPCT-5739); Memorandum Opinion and Order, released January 25, 1963 (FCC 63-62) the Commission also, in addition to others, specified an issue which requires a determination as to when and under what circumstances the applicant had determined to dispose of its construction permit, including facts pertaining to negotiations, the time and with whom. Such an issue would also be required in this case, particularly since contact had been previously made with the second transferee now involved.

Improper Consideration

33. Included in the expenses which were to be paid by W. Courtney Evans in connection with the assignment of construction permit was $1,500.00, which figure allegedly represented engineering

costs attributable to James J. Williams. This was despite the fact that in connection with the merger of MPI with James J. Williams during the hearing proceeding which preceded a grant of the WMVA construction permit, it was recited under oath that the "sole consideration" to Williams would be the rights acquired by him in connection with the merger.

34. MPI, in its Opposition to the Petition to Deny Applications, conceded that this constituted a payment to Williams in lieu of the option to acquire stock which had been granted in connection with the merger. While this, in itself, is contrary to the provisions of the merger which had been approved by the Commission, MPI also admits that, of the $1,500.00, $850.00 represents the "fair value" of Mr. Williams' engineering services. And while MPI recites that this is not contrary to any case precedent, certainly MPI is aware of the fact that the Commission has never permitted permittees to be reimbursed for the "fair value" of the efforts which were exercised by permittees in securing a construction permit. For example, while an applicant may be reimbursed for travel and related out-of-pocket expenditures, the Commission has never permitted permittees, in assigning their permits, to place an estimated value upon their time and efforts in securing the permit in order to secure reimbursement for such time and efforts. See Plains Radio Broadcasting Co., 23 RR 221 (Initial Decision, released February 7, 1962).

Summary

35. It is submitted that the authority which had been cited above encompasses situations wherein there was a lesser absence of due

diligence than exists in the present case. As pointed out in the Plains Radio case, for example, Section 319 (b) of the Communications Act contemplates a good faith intent by permittees to proceed with construction. Attempts to recoup expenses incurred in connection with applications by contracting to assign the permits, while taking no steps looking toward actual construction, even assuming that there might be some "lingering hope" of going ahead with construction, constitutes conduct which falls far short of the diligence expected of a permittee.

36. That such is the situation in the instant case is demonstrated by an examination of the assignment application and the second application for extension standing alone. Certainly there can be no argument with the proposition that an application for an extension of a construction permit must be denied where the obvious purpose is merely to permit assignment of the construction permit to another party.

37. To permit such a procedure in this case would not only be in contradiction of the authority cited, but the result would be an incongruous one from the standpoint of public policy. For example, it must be recalled that the MPI application for a construction permit was designated for hearing along with several other applications, which hearing order specified both comparative issues and so-called 307 (b) issues. Those issues were all rendered moot by the dismissal of the other applications involved upon payment of a consideration by MPI. As a result, the Commission was precluded from determining which of the applications would better serve the efficiency mandate of Section 307 (b)

[108]

and also precluded from determining which of the applicants would be better qualified, from a comparative standpoint, to meet the needs of the area to be served.

38. MPI has already pointed out that the second transferee now involved -- the 49.5 percent stockholder -- also owns the newspaper in Waynesboro. Obviously, this fact would have weighed heavily against the applicant in a comparative proceeding in view of the Commission's policy regarding diversification of control of the mass media of communications. To now permit the transfer of stock to that party -- particularly when the principal stockholder of MPI admittedly has no intention to participate in the construction or operation of the station -- would have the ironic result of placing ownership in a person who would

[108]

have contributed a substantial demerit in a comparative evaluation of all of the applicants initially involved.

39. This fact also gives rise as to another serious question which would require a resolution in view of the public interest considerations involved. That is whether that proposed stockholder was not a party to the initial application because of just that fact. In this regard, it is noted that the opposition to the Petition to Deny the Applications recites that the proposed 49.5 percent stockholder made a "wholly unsolicited inquiry" in discussing construction of the station with the owners of the franchise. While this last inquiry may, standing alone, have been unsolicited, MPI has knowledge of the fact that, on a

[109]

prior occasion or occasions, conversations and/or negotiations had been held by and between MPI and Mr. Spilman and/or their representatives looking toward Mr. Spilman's acquisition of an interest in MPI. MPI, or at least its counsel, is also aware that the one inquiry or discussion which was "unsolicited" and which resulted in the transfer now under consideration came about only after Mr. Spilman was unsuccessful in acquiring an interest in Waynesboro Broadcasting Corporation.

Respectfully submitted,

WAYNESBORO BROADCASTING CORPORATION

By /s/ Keith E. Putbrese

Smith & Pepper
Its Attorneys

714 Perpetual Building
1111 E Street, N. W.
Washington 4, D. C.
March 5, 1963

[110]

[CERTIFICATE OF SERVICE]

[111]

[Received April 3, 1963, FCC]

Law Offices of
MALLYCK & BERNTON
621 Colorado Building
Washington 5, D.C.

April 2, 1963

Mr. Ben F. Waple, Acting Secretary
Federal Communications Commission
Washington 25, D. C.

In re: WBVA,
Waynesboro, Va.

Dear Mr. Waple:

Pursuant to the provisions of Sec. 1.342 of the Commission's rules, there is enclosed herewith for filing copy of an agreement dated March 29, 1963 relating to the ownership of Music Productions, Inc., permittee of the above-referenced station.

Very truly yours,

MALLYCK & BERNTON

By_____

Attorneys for
Music Productions, Inc.

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[112]

AGREEMENT

THIS AGREEMENT, Made this 20th day of March, 1963, by and between Louis Spilman (hereinafter referred to as party of the first part), M. Robert Rogers and Teresa S. Rogers (sometimes hereinafter referred to collectively as parties of the second part), and Music Productions, Inc. (hereinafter referred to as MPI),

WITNESSETH:

1. M. Robert Rogers, Teresa S. Rogers and MPI, jointly and severally, warrant and represent as follows:

[112]

a. MPI is a corporation organized and existing under the laws of Delaware and is in good standing therein.

b. MPI is, or will at the time of closing hereunder be, duly qualified to transact business in the Commonwealth of Virginia.

c. MPI has an authorized capitalization of 1,000 shares of no par stock of which 60 shares have been issued to M. Robert Rogers and 40 shares have been issued to Teresa S. Rogers, for valid consideration, fully paid and non-assessable, and that no further stock has been authorized, issued or subscribed, or will be authorized, issued or subscribed prior to closing hereunder; and that there will be at closing hereunder no outstanding contracts, options or commitments with respect to any of the authorized and issued stock of the corporation and that they will then have the right to dispose of same.

d. That MPI is the holder of a construction permit issued by the Federal Communications Commission (sometimes hereinafter referred to as "the Commission") authorizing construction of a standard broadcast radio station to operate at Waynesboro, Va. on the frequency 970 kc, with an authorized power of 500 watts, daytime hours only, (BP-13714); that the prior contract for the assignment of same to W. Courtney Evans has been terminated pursuant to the terms thereof and that there is now pending before the Commission an application to extend the date for construction of said station. (BMP-10581).

e. That MPI has, in the past, been engaged in the ownership and production of the "Hi-Fi Fair" at

[113]

Washington, D. C., and other business activities, but that all assets, liabilities and contracts whatsoever with respect to such businesses and to all of its prior operations and affairs will be promptly disposed of so that MPI shall, at closing hereunder, have no assets, liabilities or contractual obligations other than those shown on Exhibit A hereto.

f. That the Charter and By-Laws of MPI as exhibited to first party are true and correct.

g. That MPI has paid, or will have paid by closing hereunder, a total of $7,164.00 in expenses in connection with its above construction permit (BP-13714), in addition to a further $1,500 which it expended through Blue Ridge Broadcasting Corporation as a down payment on the proposed transmitter site.

2. First party acknowledges that in entering into this Agreement he has not relied on any representation that MPI has, or will have at closing hereunder, any assets other than its above-mentioned construction permit and the transmitter site hereinafter referred to, and that he has agreed, and does hereby agree, that all other corporate assets, if any, shall be divested prior to closing hereunder for no other consideration than the payment or assumption of the corporate liabilities not listed on Exhibit A hereto.

3. Prior to the closing hereunder, Teresa S. Rogers will assign and transfer to M. Robert Rogers all of her stock in MPI. At closing hereunder, Louis Spilman shall purchase from the corporation 98 shares of its unissued stock, fully paid and non-assessable,

[113]

for $7,350, to be paid in cash at closing hereunder, and to be allocated to capital stock or surplus as MPI's directors may subsequently determine on the advice of an accountant.

'. At the closing hereunder, Louis Spilman shall lend, or cause to be loaned to MPI, the sum of $16,666, and M. Robert Rogers shall lend MPI $8,333, all to be evidenced by the corporation's notes bearing interest at the rate of 6 per cent per annum, payable annually, principal payable in seven equal annual instalments commencing three years from date of closing hereunder, with right of prepayment in whole or in part at any time without penalty provided that such repayment is made pro-rata on Spilman and Rogers' notes.

[114]

Provided that Rogers' loan shall be reduced by (a) sums in excess of $7,500 paid by MPI pursuant to paragraph 1 (g) hereof and (b) any cash balance in the corporation at closing hereunder above that required to pay any obligations or liabilities (including tax liabilities) not listed on Exhibit A hereto.

5. Closing hereunder shall take place at Waynesboro, Va. on a date mutually agreeable to the parties, but no later than 10 days after the Commission shall have granted the application for extension of time to construct the station. (BMP-10581).

6. Prior to closing, second parties shall have caused to be conveyed to MPI the real estate conveyed to Blue Ridge Broadcasting Corporation by Carl C. Loth and Mary Ellis Loth by deed dated April 16, 1962, and recorded in the Clerk's Office of the Circuit Court of Waynesboro City on May 9, 1962, subject only to the mortgage set forth in said deed and current real estate taxes and assessments, if any.

Alternatively, if the parties determine it more advantageous, the real estate shall be retained in Blue Ridge Broadcasting Corporation, in which event: (a) 49% of the stock thereof shall be issued to first party at closing hereunder and 51% will be issued to or retained by M. Robert Rogers; (b) 150/3985ths of the monies hereinabove committed by the parties for stock in and loans to MPI will, instead, be applied to stock in and loans to Blue Ridge Broadcasting; (c) second parties covenant that Blue Ridge Broadcasting shall, at closing hereunder, have good marketable title to the real estate subject only to the above-described mortgage and interest thereon and current taxes and assessments and shall have no other assets or liabilities.

7. At closing hereunder all officers and directors of MPI shall tender their resignations and the following shall be elected:

Directors:	M. Robert Rogers Louis Spilman Teresa S. Rogers
President:	M. Robert Rogers
Vice President and Treasurer:	Louis Spilman
Vice President and Secretary:	Teresa S. Rogers

[115]

From and after closing all funds of MPI shall be disbursed only by checks signed by the Treasurer and countersigned by one other officer. Louis Spilman shall remain a Vice President, Treasurer and Director until all the indebtedness provided in paragraph 4 hereof shall have been paid in full and such further period as he and/or his wife and/or children shall own 49% of the stock of the corporation.

Prior to closing hereunder the Charter and/or By-Laws of MPI shall be amended to provide for cumulative voting for the election of directors.

8. It is agreed that, except for the 100 shares to be held by M. Robert Rogers and the 98 shares to be issued to first party, all as hereinabove provided, no further stock of MPI will hereafter be issued except upon the agreement of first party and M. Robert Rogers.

9. (a)(1) If any stockholder shall desire to sell his stock in MPI or any part thereof, and shall have a bona fide offer therefor, he shall notify the other stockholders in writing, by registered or certified mail, setting forth the number of shares to be sold, the price and terms proposed and the name of the proposed purchaser or purchasers. For Fifteen (15) days following the mailing of such notice each stockholder shall have an option to acquire, at the price and terms set forth in such notice, such proportion of the offered stock as his existing holdings of the corporation's stock bears to the total holdings of those stockholders exercising this option; Provided that the option hereby created shall be exercisable only if exercised within such 15 day period with respect to all of the shares which the offering stockholder has proposed to sell, otherwise, the offering stockholder shall be free to sell said stock to the person named and on the price and terms contained in said notice.

(2) The provisions of subparagraph 9(a)(1) shall be endorsed on all stock certificates heretofore or hereafter issued by the corporation and no sale of stock shall be recognized by transfer upon the books of the corporation unless the provisions of said subparagraph have been complied with, Provided, however, that nothing in said subparagraph shall be deemed to preclude any stockholder from transferring his stock to his wife or his children or

from freely bequeathing the same without first offering it to the other stockholders, although in each such case the stock in the hands of such transferee or legatee shall be subject to the provisions of said subparagraph 9(a)(1).

(b)(1) Within six (6) months of the death of either M. Robert Rogers or Louis Spilman, the personal representative, or other successor in interest of said decedent with respect to his stock in MPI, shall, subject to the conditions hereinafter set forth, have the right to propose a price per share for the MPI stock, and terms for the payment of said price, at which he is willing to buy or sell all of the stock in the corporation, and to notify the survivor in writing by registered or certified mail. The survivor

shall have ninety (90) days following receipt of said notice in which he must either sell his stock to the offeror upon the price and terms contained in said proposal or purchase the stock of the decedent upon such price and terms; Provided that, if the wife of M. Robert Rogers or Louis Spilman shall own or succeed to any of her husband's stock upon his death, her personal representative or other successor in interest with respect to her stock in MPI shall, upon her death, have the same right as accrued to her husband's personal representative or other successor upon her said husband's death; and Provided, further that the "buy-sell" provisions of this subparagraph 9(b)(1) shall apply to all stock owned by the decedent's spouse and/or children and the spouse and/or children of the survivor, so that the option in any decedent' personal representative or other successor in interest with respect to his stock in MPI shall apply to all stock owned by the survivor and/or his wife and/or children; and, if the survivor shall elect to purchase rather than to sell, he shall have the right to purchase all stock owned by the decedent's wife and/or

children as well as that owned by the decedent; and Provided, further, that the provisions of this subparagraph 9(b)(1) shall not apply unless, at the time that they are sought to be enforced, M. Robert Rogers and Louis Spilman and/or their wives and/or their children shall, together, own all of the authorized and issued stock of MPI and no other party has acquired or would acquire an interest in any of said stock under the will or by virtue of the death of said decedent.

(2) The provisions of subparagraph 9(b)(1) shall be endorsed on all stock heretofore or hereafter issued to M. Robert Rogers, Louis Spilman and/or their respective wives and/or children for so long as they, and/or their respective wives and/or children shall own all of the issued stock of the corporation.

(c) No transfer of stock under this paragraph 9 which requires approval of the Federal Communications Commission shall be made without such approval.

10. Second parties jointly and severally warrant and represent that, after payment of the amounts designated in Exhibit A for payment on closing hereunder, MPI shall have no liabilities or contingent liabilities whatsoever except for the mortgage and taxes and assessments on the transmitter site as also shown in Exhibit A; and they covenant and agree, jointly and severally, to defend, indemnify and hold harmless MPI and first party and his successors and assigns of and from any other liability whatsoever, including liability for taxes, that may at any time in the future be charged or asserted against MPI, its officers, directors, agents or employees at any time by virtue of anything occurring prior to closing hereunder; and any damages suffered by breach of the warranties herein contained shall be a proper offset against any payment of

principal and/or interest due on the Rogers' note provided in paragraph 4 hereof or any other amount owing to him by MPI.

11. MPI hereby acknowledges receipt from first party of the sum of Fifteen Hundred Dollars ($1,500) to be applied at closing towards the purchase of first party's stock as provided in paragraph 3, above. If, for any reason whatsoever, the Commission shall not have granted BMP-10581 within ninety (90) days

[117]

from the date hereof, either first party or second parties shall have the right, at any time between said ninetieth day and public notice by the said Commission of any subsequent action granting said application, to terminate this Agreement by depositing written notice of such termination in the U. S. mails, postage prepaid, via registered or certified mail, addressed to the other party(ies) as follows:

If to Second Parties: c/o Mallyck & Bernton
621 Colorado Building
Washington 5, D. C.

If to First Party: P. O. Drawer 1027
Waynesboro, Virginia.

If such notice is given by second parties it must be accompanied by a cashier's check or certified check refunding first party's $1,500 deposit. If first party shall give said notice, second parties shall cause said refund to be mailed to first party immediately upon receipt of said notice.

12. Upon the mailing of said notice as above provided, this Agreement and all parts thereof shall terminate, and no party shall thereafter be liable to the other by virtue of anything herein contained.

13. All sums provided pursuant to paragraph 4 hereof shall be secured by a deed of trust on the corporation's real and personal assets.

IN WITNESS WHEREOF, we have hereunto set our hands and seals the day and year first hereinabove set forth.

_____ LS
First Party
_____ LS

_____ LS
Second Parties

MUSIC PRODUCTIONS, INC.

By_____

EXHIBIT A

ASSETS:

Real Estate	$5,000 00
Construction Permit (BP-13714)	No Value Ascribed

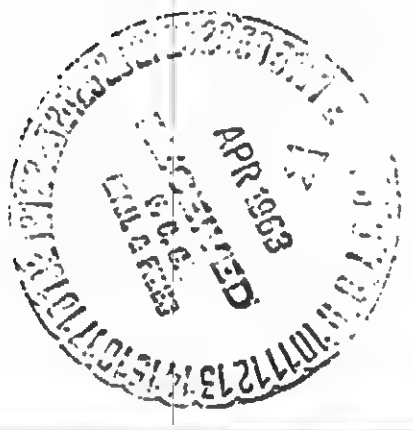
LIABILITIES:

Studio Lease	$ 300.00*
William Lydle	200.00*
Mallyck & Bernton	4,467.03*
Mortgage on Transmitter Site	3,500.00
Interest on Mortgage as of 4/1/63	210.00

Unliquidated:

Costs and charges of qualifying MPI in Virginia	*
Fees and expenses in connection with BMP-10581	*
Real Estate Taxes and assessments, if any, on Transmitter Site.	

*To be paid at closing hereunder.



FCC Form 323
March 1959

Form Approved
Budget Bureau No. 52-R104.12

United States of America
Federal Communications Commission

OWNERSHIP REPORT

NOTE: Before filling out this form, read Instruction Pages.

Section 310(b) of the Communications Act of 1934 requires that consent of the Commission must be obtained *prior* to the assignment or transfer of control of a station license or construction permit. This form may *not* be used to report or request an assignment of license or transfer of control (except to report an assignment of license or transfer of control made pursuant to prior Commission consent).

CERTIFICATE

I certify that I am Chairman of the Board
(Official title, see Instruction 9)
of Music Productions, Inc.
(Exact legal title or name of licensee or permittee)
that I have examined this report; that to the best of my knowledge, information, and belief, all statements of fact contained in said report are true and the said report is a correct statement of the business and affairs of the above-named respondent in respect to each and every matter not set forth herein.

(Date of certification must be within 30 days of date shown in Item 1 when box 1(a) is checked and in no event prior to Item 1 date.):

March 27, 19 63

(Signature of respondent)

Any person who willfully makes false statements on this report can be punished by fine or imprisonment. U. S. Code, Title 18, Section 1001 (formerly Section 80).

1. All of the information furnished in Items 1 - 8 is reported as of February 27, 19 63. *(Date must comply with Section 1.343(a) when box 1(a) below is checked.)*

This report is filed pursuant to Instruction (check one)
1(a) ☐ Renewal 1(b) ☐ T.C., A.L. or C.P. 1(c) ☒ Change of prior report
for the following stations:

Call letters	Location	Class of service
WBVA	Waynesboro, Va.	AM

Post office address of licensee or permittee:

Music Productions, Inc.
c/o Mallyck & Bernton
621 Colorado Building
Washington 5, D. C.

2. Give the name of any corporation or other entity having a direct or indirect ownership interest in the licensee or permittee (see Instruction 4).

NOT APPLICABLE

4. Name of corporation, if other than licensee or permittee, for which report is filed (see Instruction 4):

NOT APPLICABLE

3. Show the interests in any other broadcast station of the licensee or permittee, or any of its officers, directors, stockholders, or partners. (Corporations having more than 50 stockholders need answer this only with respect to officers and directors, or stockholders having 1% or more of voting stock.)

NONE

5. If permittee or licensee is a partnership, state the extent of interest of each partner.

NOT APPLICABLE

6. List all contracts and other instruments set forth in Section 1.342 of the Commission's Rules and Regulations.

Description of contract or instrument	Name of person or organization with whom contract is made	Date of execution	Date of expiration
The corporation and its stockholders have negotiated a contract with Louis Spilman of Waynesboro, Va. under which M. Robert Rogers (at present controlling stockholder of the corporation) will retain a 50.5% stock interest in the corporation and Mr. Spilman will acquire 49.5%. Although Mr. Spilman has not yet executed the agreement, full details thereof were reported to the Commission in an amendment to BMP-10581, dated February 15, 1963.			

7(a) Capitalization:

Class of stock (preferred, common or other)	Voting or non-voting	If par, show par value	If no par, show stated value or value assigned	Number of shares: Authorized	Issued and outstanding	Treasury	Unissued	Number of stockholders
			No Changes, but See Response to Question 6.					MORE THAN 50 HOLDERS OF VOTING STOCK NO [X] YES [ ] MORE THAN 50 HOLDERS OF NON-VOTING STOCK NO [X] YES [ ]

7(b) Officers, directors and stock held by each: (See Instructions 3, 4, 5, 6, 7 and 8.)

Name and residence of officers and directors	Citizenship	Office or directorship: Office held and date elected	Office or directorship: Director - date elected	Number and class of stock: Common	Preferred	Other	Number of votes	Percentage of voting stock held	Name of person replaced, if any
M. Robert Rogers McLean, Va.	U.S.	Chairman of Board 9/5/58	Yes 9/2/58	60	--	--	60	60%	
Teresa S. Rogers McLean, Va.	U.S.	Pres. 5/29/61	Yes 9/2/58	40	--	--	40	40%	
Monroe Oppenheimer Washington, D. C.	U.S.	Sec.-Treas. 9/5/58	Yes 9/2/58	None	None	None	None	None	

Remarks concerning family relationship, qualifying shares, etc.: (See Instructions 5 and 6.)

1. M. Robert Rogers and Teresa S. Rogers are husband and wife.
2. The option of James J. Williams to acquire 20% of the corporation holding the WBVA construction permit was terminated by the payment to him on February 5, 1963 of $1,500 as indicated in an "Opposition to Petition to Deny Applications" filed in BMP-10531, incorporated by reference into an amendment to BMP-10581 dated February 15, 1963.

[121]

FCC 63-715
38317

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In re Application of	)	
	)	
Music Productions, Inc.	)	File No. BMP-10581
	)	
For Additional Time to Construct Radio Station WBVA, Waynesboro, Virginia	)	

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting.

1. The Commission has before it for consideration a "Petition to Deny Applications"[1/] filed January 25, 1963, by Waynesboro Broadcasting Corporation ("Waynesboro" or "Petitioner" herein), licensee of standard broadcast Station WAYB, Waynesboro, Virginia, seeking denial of the above-captioned application by Music Productions, Inc. (MPI herein) for extension of authority to construct a new station at Waynesboro, Virginia; MPI's "Opposition" filed February 20, 1963; Waynesboro's "Reply" of March 5, 1963, and related pleadings.

2. Standing to file a petition to deny is governed by Section 309 (d)(1) of the Communications Act of 1934, as amended, which provides that a party in interest may file such a petition against any application to which Section 309(b) applies. Since Section 309(c)(2)(d) specifically provides that Section 309(b) does not apply to extension applications, it is clear that petitions to deny do not lie against extension applications and, that apart from this specific remedy, Commission actions on such applications have never been subject to challenge as a matter of right.[2/] Waynesboro's injury, if any, resulted from the grant of MPI's original application for construction permit, and grant of an extension would add no actionable element of economic or other injury.[3/] Nonetheless, because of the serious public interest questions involved, we shall

consider the matters raised on their merits.

1/ Waynesboro's Petition also sought denial of MPI's then-pending assignment application (File No. BAP-607); this application, however, was dismissed shortly after Waynesboro's Petition was filed. See discussion, infra.

2/ See Senate Report No. 44 on S. 658, 82d Cong., 1st Session.

3/ Valley Telecasting Co., 12 RR 196(e) at 199 (1955).

[122]

3. Two major allegations are made by Waynesboro: First, that MPI has not been diligent in proceeding with construction of its authorized facilities, and second, that to grant the extension would condone violations of the spirit if not the letter of both the Communications Act and the Commission's Rules. In particular, Waynesboro questions the compensation already given to James J. Williams, a one-time competing applicant, in payment for stock purchase option rights in MPI existing by virtue of an agreement for merger and dismissal approved by the Chief Hearing Examiner prior to grant of MPI's original application for construction permit. Petitioner also attacks a proposed transfer of a 49.5% stock interest in MPI to one Louis Spilman as a device to circumvent normal transfer procedures. In short, Petitioner asserts that Commission approval of the instant extension application and acceptance of related transactions would sanction a major change in the identity of the applicant which would have effected its chances in a comparative hearing, thereby nullifying the basis on which the original grant was made.

4. MPI's original application (File No. BP-13,714) for authority to construct a new standard broadcast station at Waynesboro, Virginia (970 kc, 500 w, daytime only) was filed on December 8,

1959, and, on December 7, 1960, was designated for hearing (FCC 60-1491) in a consolidated proceeding (Docket No. 13893, et al.).In that proceeding there were, inter alia, two mutually exclusive proposals for Waynesboro, Virginia, and another, mutually exclusive for both, for Luray, Virginia. A joint petition was filed on March 31, 1961, by these three applicants for merger and dismissal which was approved by the Chief Hearing Examiner on April 3, 1961 (FCC 61M-580). As approved, the agreement provided for dismissal of the Luray application in exchange for partial reimbursement of expenses, and for an option to James J. Williams (competing applicant for Williamsburg) to purchase a 20% ownership interest in MPI. With the dismissal of these two applications there were no remaining obstacles to grant of MPI's application and on April 21, 1961, an initial decision (FCC 61D-54) was issued granting that application. On June 12, 1961 (Mimeo No. 6281), the intial decision became final. February 12, 1962, was specified in the construction permit as the date for completion of construction. The call letters WBVA were subsequently assigned.

5. On February 7, 1962, MPI filed an applictaion (File No. BMP-10,119) for an extension to August 1, 1962, in which it stated that an unsuccessful effort was made to put the station on the air "in time for the fall upswing in business." MPI indicated that as a result it decided to postpone construction until the spring. A Commission letter of March 1, 1962, questioned MPI's reasons for delay and requested a clear commitment that construction would proceed diligently. MPI's April 30, 1962, reply was considered satisfactory and an extension was granted to October 1, 1962.

6. MPI's second (instant) extension application was filed on September 25, 1962. In it MPI represented that Mr. M. Robert Rogers,

principal stockholder in MPI, would be unable to devote full time and attention to construction and operation of the station because he had

[123]

accepted a position as Manager of the National Symphony Orchestra, and that an application (File No. BAP-607) for assignment of permit to W. Courtney Evans had therefore been filed on September 10, 1962. A further extension for six months was requested to enable the assignee to place the station in operation. By Commission letter of October 16, 1962, MPI was informed that action on the extension application would be withheld pending disposition of the assignment application.

7. Dismissal of the assignment application was requested in a letter dated February 4, 1963, from MPI's attorneys, which stated that the four month option to Evans had expired without action by the Commission on the application and that MPI chose to terminate the agreement. MPI's current intention is to issue 98 authorized but unissued shares of stock to Mr. Louis Spilman in exchange for reimbursement of a proportionate share of the expenses incurred by MPI in prosecuting its application. The agreement with Spilman further provides that he will lend the corporation approximately $16,000, and that Rogers will lend approximately $8.000 in addition to the latter's present commitment. Petitioner contends that this represents a subterfuge to escape the requirement of prior Commission approval. In petitioner's view, this amounts to a transfer of control since Rogers' position with the National Symphony, by his own admission, will not allow him to devote full time to the station's affairs. MPI denies that this would be the result, and insists that Mrs. Rogers, who presently holds 40% of the outstanding shares in

MPI, would assume full control for the operation of the station.[4/] Because Mrs. Rogers has had considerable experience in station management, there is no reason to believe that control would in fact devolve on Mr. Spilman. We therefore conclude that the proposed sale of stock to Spilman does not raise a bona fide transfer issue. Nor, in our view, can lack of diligence be imputed to MPI on the facts before us.

8. In asking re-examination of MPI's original grant, Waynesboro relies on comparative considerations in Docket No. 13893, which were mooted by Commission acceptance of the merger agreement but which may now assume relevance in light of subsequent events. Although Luray and Waynesboro each had one existing station, Waynesboro's 1960 population of 15,753 far exceeded Luray's 2,999. The Chief Hearing Examiner had these and other facts before him when he approved the agreement, which approval was consistent with Commission Rules and policies then in force. We cannot agree that MPI's present intention to transfer a minority ownership interest to Spilman has changed the picture. Neither his character nor financial qualifications have been questioned, and in view of the presence of a competing station in the same community, we find little merit in Petitioner's contention that Spilman's position as a Waynesboro newspaper publisher will result in an undue concentration of control over local communications media.[4(a)/]

4/ As part of the agreement with Spilman, Mrs. Rogers will transfer her 40 shares to Mr. Rogers, thereby giving him 100 shares, or a 50.5% ownership interest in MPI.

4(a)/ Although Spilman owns the only newspaper published in Waynesboro, the existence of Petitioner's unlimited time standard broadcast station in the same community (WAYB) would provide media competition. Additionally, television licensees in Richmond and Harrisonburg have pending proposals to construct VHF broadcast translator stations in Waynesboro which, if granted, would in two instances improve existing television coverage and in a third would establish a new television service.

[124]

9. Of greater concern is Williams' unexercised option to purchase MPI stock and the manner in which it was discharged. Section 311 (c)(1) of the Act provides that: "If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the Commission, . . . to effectuate an agreement whereby one or more . . . applicants withdraws his or their application or applications." All the parties to such agreement must set forth the full particulars relating thereto,[5/] approval of which is conditioned on a finding by the Commission that such agreement is consistent with the public interest and in the case of "buy-outs", on a finding that the consideration to be given does not exceed the amount legitimately and prudently expended by the applicant in prosecuting his application. Merger agreements, however, are specifically exempted from this requirement - Section 311(c)(3); hence, in approving the Williams dismissal agreement, no finding was entered concerning the value of Williams' option. In September of 1962, Williams agreed to relinquish his option rights to a 20% ownership interest in MPI for $1500 cash consideration. Payment was made on February 5, 1963. We are therefore presented with a fait accompli never submitted for Commission approval. At issue is whether Section 311(c) of the

Act or other authority requires that Commission approval be obtained prior to the occurrence of material deviations from the terms of merger agreements previously approved in hearing. Since only Section 311(c) of the Act specifically deals with dismissal agreements, it could be viewed as the sole basis for Commission consideration of such agreements, and that as a result Commission authority in this area exists only during the pendency of mutually exclusive applications.[6/] As indicated below, we do not believe that this interpretation is consistent either with Congressional intent in adoption of the 1960 amendment of Section 311 or with our statutory mandate to act in the public interest.[7/]

10. It is clear that material deviations from the terms of the approved agreement have occurred. Not only were those changes not anticipated by the Chief Hearing Examiner in ruling on the agreement, but the changes were totally inconsistent with the terms of the agreement, and therefore it cannot be said that there was approval by implication. Nor can it be said that the deviation was minor, especially in view of the fact the "buy-outs" are subjected to additional requirements beyond those applied to mergers, when submitted for Commission approval. Recognizing that new

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5/ In the manner prescribed in Section 1.316 of the Commission's Rules, authority for which is contained in Section 311(c)(2) of the Act.

6/ See Sections 311 (c)(1) and (4) of the Act.

7/ We have had occasion to consider the impact of Section 311(c) on Commission authority in this general area in the matter of the applications involved in the WRCV-TV renewal case; see Memorandum Opinion and Order (FCC 63-257), referred to infra.

elements have been substituted for old, it becomes clear that they relate back to the original agreement. The new agreement became the quid pro quo for dismissal, thus creating an affirmative obligation on MPI to seek prior Commission approval. Commission jurisdiction to consider "buy-outs" antedated the 1960 amendments and there is no basis for believing Congress intended to limit our jurisdiction by the adoption of those amendments. In the Memorandum Opinion and Order cited in Footnote 7, we set forth at considerable length our view of the essential public interest questions involved in dismissal agreements. We need not repeat that discussion here, except to reiterate our fundamental concern that our processes not be abused and that inquiry must be made into the circumstances surrounding the proposed dismissal. In this connection, the bona fides of the parties proposing dismissal is relevant. Language in the House Committee Report on the 1960 amendment supports this view.[8/]

11. The questions then arise: Of what significance was MPI's failure to obtain prior Commission approval? And does the new agreement meet the standards against which "buy-outs" are normally judged? It appears that although the $1500 payment to Williams involved relinquishment of his rights under the option agreement, it actually stands on another footing.[9/] It was in fact two payments, one of $675 for reimbursement of expenses and another of $850 for engineering work done by Williams for MPI. Without contradiction from Waynesboro, MPI asserts that $675 represents an amount not in excess of Williams' out-of-pocket expenses in prosecuting his application. We conclude that this amount was legitimately and prudently expended within the meaning of Section 311(c). As to the remaining $850, Williams' application, as designated for hearing,

[125]

did not include a number of detailed engineering exhibits which would have later been required. As a result of the merger agreement with Williams, the facilities he proposed were adopted by MPI. Since Williams (a qualified engineering consultant) lacked exhibits which could be adopted, he prepared new ones for MPI. Affidavits submitted with the merger agreement show that it was arrived at on February 9, 1961, well before the hearing exhibit exchange date of February 21, 1961. Thus, although that agreement was not reduced to writing until February 23, 1961, it had existed for some time previously. In light of these averments, we have no reason to question MPI's assertion that the engineering exhibits prepared by Williams were in fact done for MPI, with whom he had already reached a verbal agreement. We feel that $825 is not excessive for the services rendered by Williams in preparing exhibits and contour maps on behalf of MPI.

8/ "As indicated above, the provision prohibiting approval of agreements for payments in excess of expenditures would be inapplicable in cases of bona fide mergers and the Commission, thus, would have to determine in each instance whether a proposed merger is a bona fide merger of competing interests or whether it is merely a device to evade the prohibition applicable to non-merger agreements." - House Report No. 1800, June 13, 1960 to accompany S. 1898 (emphasis supplied). Clearly, such inquiry is as relevant after the fact as before.

9/ The amount of $1500 represents a cash settlement on $1525 claimed by Williams.

[126]

12. Although it is clear that MPI should have filed the revised agreement for Commission approval prior to buying out Williams' option, its failure to do so must be viewed in the context in which it occurred. This is the first occasion we have had to articulate our view that prior Commission approval is a sine qua non in situations such as this. Because the Act and Rules do not specifically deal with this matter, we recognize

that a permittee could be in genuine doubt about this requirement. Under these circumstances, fairness dictates that we not act against MPI for failure to anticipate our interpretation of Section 311(c) of the Act. Moreover, MPI's previously pending assignment application listed an outstanding obligation in the amount of $1500 in Williams' favor. Thus, while we were advised of MPI's intentions, it was not until the instant pleadings were filed that MPI indicated that the "buy-out" had been consummated. Nonetheless, there is no evidence to suggest that MPI sought to deceive the Commission.[10/] As we have indicated, the fault lay with MPI's failure to obtain prior Commission approval and not with the agreement itself. Under the circumstances of this case, we conclude that no useful purpose would be served by designating the instant application for hearing or by imposing administrative sanctions against MPI.

In light of the foregoing, it is ORDERED that Waynesboro's "Petition to Deny Applications" is hereby DENIED.

IT IS FURTHER ORDERED, That in view of the commitment to early completion of station construction contained in MPI's amendment filed February 20, 1963, the above-captioned application is hereby GRANTED through October 31, 1963.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

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10/ Although MPI did not timely file ownership data to reflect the "buy-out", its earlier disclosure to the Commission rules out any question of bad faith.

80

FCC Form 361
March 1953

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

File No. BMP-10,[illegible]
Call Letters WBVA
Modification No. 3

MODIFICATION OF CONSTRUCTION PERMIT
STANDARD BROADCAST STATION

Music Productions Incorporated
Radio Station W B V A
c/o Mallyck & Bernton
621 Colorado Bldg.
Washington 5, D. C.

Permittee: MUSIC PRODUCTIONS INCORPORATED

Station location: State VIRGINIA City WAYNESBORO

The Authority Contained in Authorization File No. BP-13,714
dated ~~June 12, 1961~~ granted to the Permittee listed above is hereby modified in part as follows:

DATE OF REQUIRED COMPLETION OF CONSTRUCTION: October 31, 1963

This modification of construction permit shall be attached to and be made a part of the construction permit of this station.

Except as herein expressly modified, the above-mentioned construction permit, subject to all modifications heretofore granted by the Commission, is to continue in full force and effect in accordance with the terms and conditions thereof and for the period therein specified.

Dated this 24th day of JULY, 1963.

FEDERAL COMMUNICATIONS COMMISSION

jad

AUG 16 1963

F.C.C. - Washington, D. C.

Secretary

25

[128]

Law Offices Of
MALLYCK & BERNTON
621 Colorado Building
Washington 5, D. C.

August 2, 1963

Mr. Ben F. Waple, Secrrtary
Federal Communications Commission
Washington, D. C.

Re: Transmittal of application for a "local" move of the antenna location of Station WBVA, Waynesboro, Va.

Dear Mr. Waple:

Transmitted herewith, in triplicate, is the application of Music Productions, Inc., requesting authority for a "local" move of the antenna location of Station WBVA, Waynesboro, Virginia.

No changes are proposed that would raise any interference or allocation questions. Consequently, the application can, and should, be treated as a "Secretary's Case."

Any correspondence or inquiry in connection with this matter may be directed to the undersigned attorneys for the applicant.

Very truly yours,

MALLYCK & BERNTON

By_____

Enclosures

DUPLICATE

FCC Form 301
Nov. 1962

Form Approved
Budget Bureau No. 52-R014.17

Section I

UNITED STATES OF AMERICA
FEDERAL COMMUNICATIONS COMMISSION

APPLICATION FOR AUTHORITY TO CONSTRUCT A NEW BROADCAST STATION OR MAKE CHANGES IN AN EXISTING BROADCAST STATION

INSTRUCTIONS

A. This form is to be used in applying for authority to construct a new AM (standard), commercial FM (frequency modulation), or television broadcast station, or to make changes in existing broadcast stations. This form consists of this part, Section I, and the following sections:

Section II, Legal Qualifications of Broadcast Applicant

Section III, Financial Qualifications of Broadcast Applicant

Section IV, Statement of Program Service of Broadcast Applicant

Section V-A, Standard Broadcast Engineering Data

Section V-B, FM Broadcast Engineering Data

Section V-C, Television Broadcast Engineering Data

Section V-G, Antenna and Site Information

B. Prepare three copies of this form and all exhibits. Sign one copy of Section I. Prepare two additional copies (a total of five) of Section V-G and associated exhibits. File all the above with Federal Communications Commission, Washington 25, D. C.

C. Number exhibits serially in the space provided in the body of the form and list each exhibit in the space provided on page 2 of this Section. Show date of preparation of each exhibit, antenna pattern, and map, and show date when each photograph was taken.

D. The name of the applicant stated in Section I hereof shall be the exact corporate name, if a corporation; if a partnership, the names of all partners and the name under which the partnership does business; if an unincorporated association, the name of an executive officer, his office; and the name of the association. In other Sections of the form the name need be only sufficient for identification of the applicant.

E. Information called for by this application which is already on file with the Commission *(except that called for in Section V-G)* need not be refiled in this application provided (1) the information is now on file in another application or FCC Form filed by or on behalf of this applicant; (2) the information is identified fully by reference to the file number (if any, the FCC form number, and the filing date of the application or other form containing the information and the page of paragraph referred to, and (3) after making the reference, the applicant states: "No change since date of filing." Any such reference will be considered to incorporate into this application all information, confidential or otherwise, contained in the application or other form referred to. The incorporated application or other form will thereafter, in its entirety, be open to the public.

F. This application shall be personally signed by the applicant, if the applicant is an individual; by one of the partners, if the applicant is a partnership; by an officer, if the applicant is a corporation; by a member who is an officer, if the applicant is an unincorporated association; by such duly elected or appointed officials as may be competent to do so under the laws of the applicable jurisdiction, if the applicant is an eligible government entity; or by the applicant's attorney in case of the applicant's physical disability or of his absence from the United States. The attorney shall, in the event he signs for the applicant, separately set forth the reason why the application is not signed by the applicant. In addition, if any matter is stated on the basis of the attorney's belief only (rather than his knowledge), he shall separately set forth his reasons for believing that such statements are true.

G. Before filling out this application, the applicant should familiarize himself with the Communications Act of 1934, as amended, Parts 1, 2, 3 and 17 of the Commission's Rules and Regulations and the Standards of Good Engineering Practice.

H. BE SURE ALL NECESSARY INFORMATION IS FURNISHED AND ALL PARAGRAPHS ARE FULLY ANSWERED. IF ANY PORTIONS OF THE APPLICATION ARE NOT APPLICABLE, SPECIFICALLY SO STATE. DEFECTIVE OR INCOMPLETE APPLICATIONS MAY BE RETURNED WITHOUT CONSIDERATION.

File No.

Name and post office address of applicant (See Instruction D)

Music Productions, Inc.
c/o Haliçek & Berntson
621 Colorado Building
Washington 5, D. C.

129

Send notices and communications to the following-named person at the post office address indicated if different than above

To the above.

1. Requested facilities

Frequency	Channel No.	Power in kilowatts: Night	Power in kilowatts: Day	Minimum hours operation daily
	S	[illegible]		

Hours of operation

Unlimited	Sharing with (Specify Stations)	Other (Specify)
Daytime only		
Limited [illegible]	[illegible]	

Type of station (as Standard, FM, Television)

Station location

City	State
[illegible]	[illegible]

2. If authority to make changes in an existing station is requested

(a) Present facilities

Frequency	Call	Channel No.	Power in kilowatts: Night	Power in kilowatts: Day	Minimum hours operation daily
970 KC	WBVA	--	0	0.5	Nine

Hours of operation

Unlimited	Sharing with (Specify Stations)	Other (Specify)
Daytime only X	NOT APPLICABLE	
Limited		

Station location

City	State
Waynesboro	Virginia

(b) If this application is for changes in an existing authorization, complete Section I and any other sections necessary to show all substantial changes in information filed with the Commission in prior applications or reports. In the spaces below check Sections submitted herewith and as to Sections not submitted herewith refer to the prior application or report containing the requested information in accordance with Instruction E. (If contemplated expenditures are less than $5,000, complete paragraph 1 of Section III only. Section IV is not required for applications for minor changes not involving change in power, change in frequency, change in hours of operation, or moving from city to city.)

Section No. Para. No. Reference (File or Form No. and Date)

☐ Section II
☐ Section III
☐ Section IV
☑ Section V

Have there been any substantial changes in the information incorporated in this application by reference in this paragraph? Yes ☐ No ☐

3. If this application is contingent on the grant of another pending application, state name of other applicant and file number of other application.

Not Contingent.

FCC Form 301 Section I, Page 2

THE APPLICANT hereby waives any claim to the use of any particular frequency or of the ether as against the regulatory power of the United States because of the previous use of the same, whether by license or otherwise, and requests an authorization in accordance with this application. (See Section 304 of the Communications Act of 1934).

THE APPLICANT represents that this application is not filed for the purpose of impeding, obstructing, or delaying determination on any other application with which it may be in conflict.

THE APPLICANT acknowledges that all the statements made in this application and attached exhibits are considered material representations, and that all the exhibits are a material part hereof and are incorporated herein as if set out in full in the application.

CERTIFICATION

I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Signed and dated this 2nd day of August, 1963

Music Productions, Inc.
(NAME OF APPLICANT)

By _____
(SIGNATURE)

Title Vice President

WILLFUL FALSE STATEMENTS MADE ON THIS FORM ARE PUNISHABLE BY FINE AND IMPRISONMENT. U. S. CODE, TITLE 18, SECTION 1001.

If applicant is represented by legal or engineering counsel, state name and post office address: Mullyck & Bernton, 621 Colorado Bldg., Washington, D.C. Silliman, Moffet & Kowalski, 1405 G St., N.W., Washington, D. C.

EXHIBITS furnished as required by this form:

Exhibit No.	Section and Para. No. of Form	Name of officer or employee (1) by whom or (2) under whose direction exhibit was prepared (show which)	Official title

NOTE A:

This application only requests a CP for a local move of the proposed WBVA antenna location.

ENGINEERING REPORT

SILLIMAN, MOFFET & KOWALSKI

1405 G STREET, N.W. CONSULTING RADIO ENGINEERS WASHINGTON 5, D. C.

ENGINEERING EXHIBIT

SUPPORTING THE APPLICATION OF

MUSIC PRODUCTIONS, INC.

FOR A MODIFICATION OF CONSTRUCTION PERMIT

TO CHANGE THE TRANSMITTER LOCATION

OF

WBVA - WAYNESBORO, VIRGINIA

970 KC/S 0.5 KW-ND-D

JULY 31, 1963

Broadcast Application | FEDERAL COMMUNICATIONS COMMISSION | Section V-A

STANDARD BROADCAST ENGINEERING DATA

Name of applicant: MUSIC PRODUCTIONS, INC.

WBVA

1. Purpose of authorization applied for: (Indicate by check mark)
(If application is for a new station or for any of the changes numbered B through F, complete all paragraphs of this form; if change G is of a character which will change coverage or increase the overall height of the antenna structure more than 20 feet, answer all paragraphs, otherwise complete only paragraphs 2 and 10 and the appropriate other paragraphs; for changes H through M, complete only paragraph 2 and the appropriate other paragraphs; for change N complete only paragraphs 2 and 5.)

- A. ☐ Construct a new station
- B. ☐ Change power
- C. ☒ Change transmitter location
- D. ☐ Change frequency
- E. ☐ Approval of site and antenna
- F. ☐ Special Service Authorization
- G. ☐ Change in antenna system (including addition of FM and TV antennas)
- H. ☐ Change frequency control equipment
- I. ☐ Change tubes in last radio stage
- J. ☐ Change system of modulation
- K. ☐ Change transmitter
- L. ☐ Install auxiliary or alternate main transmitter
- M. ☐ Other changes (specify)
- N. ☐ Change studio location

If this application is not for a new station, summarize briefly the nature of the changes proposed.

2. Facilities requested

Frequency	Hours of operation	Power in kilowatts Night	Power in kilowatts Day
970	DAYTIME	--	0.5

3. Station location

State	City or town
VIRGINIA	WAYNESBORO

4. Transmitter location

State	County
VIRGINIA	AUGUSTA

City or town	Street Address (or other identification)
WAYNESBORO	ON STATE RT. 795 0.25 MILES SE OF PUNCH BOWL ROAD INTERSECTION

5. Main studio location

State	County
VIRGINIA	AUGUSTA

City or town	Street and number, if known
WAYNESBORO	SAME AS TRANSMITTER SITE

6. Remote control point location NONE

State	City or town

Street Address (or other identification)

7. Transmitter *

Make	Type No.	Rated Power

(If the above transmitter has not been accepted for licensing by the F.C.C., attach as Exhibit No. a complete showing of transmitter details. Showing should include schematic diagram and full details of frequency control. If changes are to be made in licensed transmitter include schematic diagram and give full details of change.)

8. Modulation monitor *

Make	Type No.

9. Frequency monitor *

Make	Type No.

10. Antenna system, including ground or counterpoise

Non-Directional Antenna: Day ☒ Night ☐

Directional Antenna:
- Day only (DA-D) ☐
- Night only (DA-N) ☐
- Same constants and power day and night (DA-1) ☐
- Different constants or power day and night (DA-2) ☐

(If a directional antenna is proposed submit complete engineering data. Show clearly whether directional operation is for day or night or both. If day and night patterns are different give full information on each pattern. This information is in addition to the information in Paragraph 10 and is submitted as Exhibit No. and signed by the engineer who designed the antenna system.)

Type radiator	Height in feet of complete radiator above base insulator, or above base if grounded.
VERTICAL, STEEL, GUYED, UNIFORM CROSS SECTION	292

Overall height in feet above ground. (Without obstruction lighting)	Overall height in feet above mean sea level. (Without obstruction lighting)
297	1667

Overall height in feet above ground. (With obstruction lighting)	Overall height in feet above mean sea level. (With obstruction lighting)
300	1670

If antenna is either top loaded or sectionalized, describe fully as Exhibit No. *

Excitation: Series ☒ Shunt ☐

Geographic coordinates to nearest second.
For direction antenna give coordinates of center of array.
For single vertical radiator give tower location.

North latitude	West longitude
38 ° 05 ' 13 "	78 ° 54 ' 43"

If not fully described above, give further details and dimensions including any other antennas mounted on tower and associated isolation circuits as Exhibit No. ENG (Height figures should not include obstruction lighting.)

Submit as Exhibit No. ENG a plat of the transmitter site showing boundary lines, and roads, railroads, or other obstructions; and also layout of the ground system or counterpoise. Show number and dimensions of ground radials or if a counterpoise is used, show height and dimensions.

11. Attach as Exhibit No. ENG a sufficient number of aerial photographs taken in clear weather at appropriate altitudes and angles to permit identification of all structures in the vicinity. The photographs must be marked so as to show compass directions, exact boundary lines of the proposed site, and locations of the proposed 1000 mv/m contour for both day and night operation. Photographs taken in eight different directions from an elevated position on the ground will be acceptable in lieu of the aerial photographs if the data referred to can be clearly shown.

*ON FILE - NO CHANGE

Broadcast Application | STANDARD BROADCAST ENGINEERING DATA | Section V-A, Page 2

12. Allocation Studies:

A. Attach as Exhibit No. ENG map or maps, having reasonable scales, showing the 1000, 25, 5, 2, normally protected and interference-free contours in mv/m for both day and night operation both existing and as proposed by the application. (NOTE: The 2 mv/m night contour need not be supplied if service is not rendered thereto.)

B. (1) For daytime operation, attach as Exhibit No. ENG an allocation study, utilizing Figure M-3 of the Rules or an accurate full scale reproduction thereof and using pertinent field strength measurement data where available, a full scale exhibit of the entire pertinent area to show the following:

(a) Normally protected, the interference-free, and the interfering contours for the proposed operation along all azimuths.

(b) Complete normally protected and interference-free contours of all other proposals and existing stations to which objectionable interference would be caused.

(c) Interfering contours over pertinent arcs of all other proposals and existing stations from which objectionable interference would be received.

(d) Normally protected and interfering contours over pertinent arcs of all other proposals and existing stations which require study to show the absence of objectionable interference.

(e) Plot of the transmitter location of each station or proposal requiring investigation, with identifying call letters, file numbers, and operating or proposed facilities.

(f) Properly labeled longitude and latitude degree lines, shown across entire exhibit.

(2) For daytime operation, when necessary to show more detail, attach as Exhibit No. ENG an additional allocation study, utilizing World or Sectional Aeronautical charts to clearly show interference or absence thereof.

(3) For daytime operation, attach as Exhibit No. ENG a tabulation of the following:

(a) Azimuths along which the groundwave contours were calculated for all stations or proposals shown on allocation study exhibits required by Paragraph 12B above.

(b) Inverse distance field strength used along each azimuth.

(c) Basis for ground conductivity utilized along azimuths specified in (3) (a). If field strength measurements are used, the measurements must be either submitted or be properly identified as to location in Commission files.

C. For nighttime operation, attach as Exhibit No. -- , allocation data to include the following:

(1) Proposed nighttime limitation to other existing or proposed stations with which objectionable interference would result, as well as those other proposals and existing stations which require study to clearly show absence of objectionable interference.

(2) All existing or proposed nighttime limitations which enter into the nighttime R.S.S. limitation of each of the existing or proposed facilities investigated under C (1) above.

(3) All existing and proposed limitations which contribute to the R.S.S. nighttime limitation of the proposed operation, together with those limitations which must be studied before being excluded.

(4) A detailed interference study plotted upon an appropriate scale map if a question exists with respect to nighttime interference to other existing or proposed facilities along bearings other than on a direct line toward the facility considered.

(5) Utilizing an appropriate scale map, clearly show the normally protected and interference-free contours of each of the existing and proposed stations which would receive nighttime interference from the proposed operation.

(6) The detailed basis for each nighttime limitation calculated under C (1) (2) (3) and (4) above, including a copy of each pertinent radiation pattern in the vertical plane and basis therefor.

13. Attach as Exhibit No. ENG tables of the areas and populations within the contours included in Paragraph 12 (A) above, as well as within the normally protected and interference-free contours of each station or proposed operation to which interference would be caused according to the Commission Rules.

(NOTE: See the Standard Broadcast Technical Standards. All towns and cities having populations in excess of those given in Section 3.182(g) are not to be included in the tabulation of populations within the service contours. The 1950 or later Census Minor Civil Division maps are to be used in making population counts, subtracting any towns or cities not receiving adequate service, and where contours cut a minor division assuming a uniform distribution of population within the division, to determine the population included in the contours unless a more accurate count is made.)

Broadcast Application	STANDARD BROADCAST ENGINEERING DATA	Section V-A, Page 3

14. Attach as Exhibit No. ENG map or maps having reasonable scales clearly showing the following:

(a) Proposed antenna location

(b) General character of the city or metropolitan district, particularly the retail business, wholesale business, manufacturing, residential, and unpopulated areas (by symbols, cross-hatching, colored crayons, or other means)

(c) Heights of buildings or other structures and terrain elevations in the vicinity of the antenna, indicating the location thereof.

(d) Transmitter location and call letters of all radio stations (except amateur) and the location of established commercial and government receiving stations within 2 miles of the proposed transmitter location. Call letters and locations of broadcast stations, including FM and television, within 5 miles must be shown.

(e) Terrain

15. If this application is for modification of construction permit state briefly as Exhibit No. ENG the present status of construction and indicate when it is expected that construction will be completed.

I certify that I am the ~~Technical Director, Chief Engineer~~ Consulting Engineer for the applicant of the radio station for which this application is submitted and that I have examined the foregoing statement of technical information and that it is true to the best of my knowledge and belief. (This signature may be omitted provided the engineer's original signed report of the data from which the information contained herein has been obtained is attached hereto.)

Date JULY 31, 1963

~~Technical Director, Chief Engineer~~ Consulting Engineer

JOHN A. MOFFET

385

Broadcast Application | FEDERAL COMMUNICATIONS COMMISSION | Section V-C (Antenna)

ANTENNA AND SITE INFORMATION
(see instruction B Section I)

Name of applicant: MUSIC PRODUCTIONS, INC.

Address where applicant can be reached in person: COLORADO BLDG., WASHINGTON, D. C. c/o WILLIAM P. BERNTON

Since this Section is submitted to the Regional Airspace Subcommittee of the Air Coordinating Committee for clearance in connection with obstructions to air navigation, it is necessary that all the data called for be supplied. Previously and separately filed data must not be incorporated by reference.

Legal Counsel: MALLYCK AND BERNTON

Address: COLORADO BLDG., WASHINGTON, D. C.

Consulting Engineer: SILLIMAN, MOFFET AND KOWALSKI

Address: 1405 G ST., N.W., WASHINGTON 5, D.C.

Class of station: STANDARD BROADCAST

Facilities requested: 970 Kc/s; 0.5 KW-D

Purpose of application (Check appropriate box)

a. New antenna construction [ ]
b. Alteration of existing antenna structures [ ]
c. Change in location [X]

1. Location of antenna

State	County	City or Town
VIRGINIA	AUGUSTA	WAYNESBORO

Exact antenna location (street address) (If outside city limits, give distance and direction from, and name of nearest town)

ON STATE ROUTE 795 0.25 MILES SE OF INTERSECTION WITH PUNCH BOWL ROAD

Geographic coordinates (to be determined to nearest second. For directional antenna give coordinates of center of array.) For single vertical radiator give tower location.

North latitude	West longitude
38° 05' 13"	78° 54' 43"

2. Features of surrounding terrain

List any natural formations or existing man-made structures (hills, trees, water tanks, towers, etc.) which, in the opinion of the applicant, would tend to shield the antenna from aircraft and thereby minimize the aeronautical hazard of the antenna.

NONE

Submit as Exhibit No. ENG a chart on which is plotted the exact location of the antenna site, and also the relative location of the natural formations and/or the existing man-made structures listed above.
The chart used shall be an Instrument Approach Chart (or the landing chart on reverse side thereof), or a Sectional Aeronautical Chart, choice depending upon proximity of the antenna site to landing areas. 1/ In general, the Sectional Aeronautical Chart should be used only when the antenna site is more than 10 miles from a landing area or when an Instrument Approach Chart is unobtainable. 1/ These charts may be purchased from the U. S. Coast and Geodetic Survey, Washington 25, D. C.
1/ Exception - Where the proposed antenna site is within the boundary of a landing area for which no Instrument Approach Chart is available, submit a self-made, large scale map showing antenna site, runway(s) and existing man-made structures listed above.

3. Designation, distance, and bearing to center line of nearest established airway within 5 miles: V143 2.7 MI. N 304° E

4. List all landing areas within 10 miles of antenna site. Give distance and direction to the nearest boundary of each landing area from the antenna site.

	Landing Area	Distance	Direction
(a)	VALLEY	1.8 MI.	N 239° E
(b)			
(c)			

5. Description of antenna system (If directional, give spacing and orientation of towers).

A GUYED, CONSTANT CROSS SECTION, STEEL TOWER.

Type

Description of tower(s): UNIFORM CROSS SECTION, VERTICAL, STEEL TOWER

Self-supporting | Guyed X | Tubular (Pole)

Tower (height figures should include obstruction lighting)	#1	#2	#3	#4	#5	#6
Height of radiating elements	292					
Overall height above ground	300					
Overall height above mean sea level	1670					

If a combination of Standard, FM, or TV operation is proposed on the same multi-element array (either existing or proposed) submit as Exhibit No. -- a horizontal plan for the proposed antenna system, giving heights of the elements above ground and showing their orientation and spacing in feet. Clearly indicate if any towers are existing.

Submit as Exhibit No. ENG a vertical plan sketch for the proposed total structure (including supporting building if any) giving heights above ground in feet for all significant features. Clearly indicate existing portions, noting painting and lighting.

Is the proposed antenna system designed so that obstruction lights may be installed and maintained at the uppermost point(s)? Yes [X] No [ ]

6. Is the proposed site the same or immediately adjoining the transmitter-antenna site of other stations authorized by the Commission or specified in another application pending before the Commission? Yes [ ] No [X]

If the answer is "Yes", give

Call Letters	File number

Date: JULY 31, 1963

Signature of Engineer preparing data: John A. Moffet

JOHN A. MOFFET

[136]

[136]

Engineering Report

SILLIMAN, MOFFET & KOWALSKI

1405 G Street NW Consulting Radio Engineers Washington, D.C.

WBVA

Waynesboro, Va.

I. INTRODUCTION

1. Music Productions, Inc., currently holds a construction permit for application, BMP-10581, authorizing construction of a 0.5 Kw non-directional daytime only operation on 970 Kc/s at Waynesboro, Virginia, with designated call letters WBVA.

2. This engineering exhibit supports the application of Music Productions, Inc., permittee of Radio Station WBVA, to move its site approximately 1.9 miles due west of the site specified on its construction permit. It is also proposed to decrease the tower height above base insulators by eight feet. No change in the top loading dimensions are proposed.

3. The studio location specified herein is to be at the transmitter site. The construction permit was granted on a "studio site to be determined" basis. The request for remote control authority is deleted as no longer being required.

4. No other engineering changes are proposed herein. The change in site does not appreciably affect the coverage contours beyond the 25 mv/m contour. Therefore, data for the WBVA operation, which is presently on file with the FCC, and which remains substantially unchanged by this site move, is not being resubmitted herewith. The eight foot reduction in tower height will have a negligible affect on the antenna radiation efficiency which is still assumed to be 147 mv/m unattentuated at one mile for 500 watts.

5. All paragraphs answered fully on the attached Section V-A and V-G or FCC Form 301 will not be repeated herewith.

[136]

II. FURTHER RESPONSE TO SECTION V-A OF FCC FORM 301

Paragraph 10:

Figure 1 is an exhibit of the proposed property plat and ground system.

Figure 2 is a vertical plan sketch of the proposed antenna.

Paragraph 11:

Aerial photographs as required by this paragraph are not submitted herewith. They will be taken, suitably marked and filed with the FCC at the earliest possible time.

[151]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

FCC 60-1491
97331

In re Applications of:

JOHN LAURINO Waynesboro, Virginia Requests: 970 kc, 500w, Day	)	Docket No. 13891 File No. BP-12428
RADIO DANVILLE, INCORPORATED (WDTI) Danville, Virginia Has: 970 kc, 500w, Day Req: 970 Kc, 1kw, Day	)	Docket No. 13892 File No. BP-13618
MUSIC PRODUCTIONS, INCORPORATED Waynesboro, Virginia Requests: 970 kc, 500w, Day	)	Docket No. 13893 File No. BP-13714
JAMES J. WILLIAMS Waynesboro, Virginia Requests: 970 kc, 500w, Day	)	Docket No. 13894 File No. BP-13746
Samuel J. Cole and J.R. Mims, Sr. d/b as BLUE RIDGE BROADCASTERS Luray, Virginia Requests: 970 kc, 500w, Day	)	Docket No. 13895 File No. BP-13753

For Construction Permits

ORDER

At a session of the Federal Communications Commission held at its offices in Washington, D. C., on the 7th day of December, 1960;

The Commission having under consideration the above-captioned and described applications;

IT APPEARING, That, except as indicated by the issues specified below, the instant applicants are legally, technically, and otherwise qualified; that Radio Danville, Incorporated, is financially qualified; but that, John Laurino, Music Productions, Incorporated, James J. Williams and Samuel J. Cole and J. R. Mims, Sr. d/b as, Blue Ridge Broadcasters may not be financially qualified to construct and operate their instant proposals; and

[152]

IT FURTHER APPEARING, That, pursuant to Section 309(b) of the Communications Act of 1934, as amended, the Commission, in a letter dated April 7, 1960, and incorporated herein by reference, notified the instant applicants and any other known parties in interest, of the grounds and reasons for the Commission's inability to make a finding that a grant of any of the applications would serve the public interest, convenience, and necessity; and that a copy of the aforementioned letter is available for public inspection at the Commission's offices; and

IT FURTHER APPEARING, That the instant applicants filed timely replies to the aforementioned letter, which replies have not, however, entirely eliminated the grounds and reasons precluding a grant of the said applications and requiring an evidentiary hearing on the particular issues as hereinafter specified; and in which the applicants stated that they would appear at a hearing on the instant applications; and

IT FURTHER APPEARING, That, by the above-mentioned letter of April 7, 1960, John Laurino was notified that it did not appear that he had the necessary financial ability to construct and operate his instant proposal and in addition, to supply the funds necessary to meet his partnership commitment in the application for Chester, Virginia, (BP-13752); that the said letter further requested information regarding a purported bank loan of $10,000 for use in the Chester application and whether or not this amount was included in his showing of cash and liquid assets available; that in his reply to this letter, Mr. Laurino filed an amendment to his proposal which showed only cash or identifiable liquid assets available in the amount of $16,800; listed $25,000 as the market value of bonds and securities, but failed to show that they were readily convertible to cash and failed to give any further information in regard to the $10,000 loan for the Chester proposal; and therefore, in light of the fact that Mr. Laurino failed to show that his $25,000 in bonds and securities were readily marketable, that a valid $10,000 loan commitment was outstanding with respect to the Chester proposal, and that the loan, if outstanding was not included in the $16,800 cash and liquid assets shown in the aforementioned amendment, it cannot be determined at this time that Mr. Laurino is financially qualified; and

IT FURTHER APPEARING, That, Music Productions, Incorporated was notified by letter of April 7, 1960, that its deferred credit agreement was unacceptable as submitted and that its principal stockholder, Robert Rogers, failed to show current and liquid assets sufficient to meet his $30,000 loan commitment to the applicant; by amendment dated May 17, 1960, the instant applicant submitted a new deferred credit agreement showing a net credit of $12,450 and a purported balance sheet of Mr. Rogers which did not clearly set forth sufficient cash

or liquid assets to meet his loan commitment to the applicant; that even if Mr. Rogers had demonstrated his ability to meet the loan commitment it could not presently be determined that the applicant is financially qualified, inasmuch as, the total cash which would then have been available to the applicant amounts to only $42,954 whereas Music Productions' capital requirements to construct and operate its proposal for a reasonable period of time is approximately $44,500; and

[153]

IT FURTHER APPEARING, That by the above-mentioned letter of April 7, 1960, James J. Williams was notified that his balance sheet failed to reveal sufficient cash or liquid assets to construct and operate, for a reasonable period of time, the instant proposal and his other proposal (BP-11148), which is presently in hearing; and that the said Mr. Williams has failed to file any additional information in response to the said Commission letter; and

IT FURTHER APPEARING, That, the partnership of Samuel J. Cole and J. R. Mims, Sr. d/b as Blue Ridge Broadcasters was notified by the said letter of April 7, 1960, that they had not shown sufficient cash or liquid assets to construct and operate their proposal; that in reply to the said letter additional data was submitted which shows that Mr. Cole has sufficient cash or liquid assets to meet his 75% partnership commitment; but that the said reply failed to show that Mr. Mims had sufficient cash or liquid assets to meet his 25% partnership commitment; and

IT FURTHER APPEARING, That, by the said letter of April 7, 1960, Music Productions, Incorporated was apprised that Section 2, Article V of its bylaws provides that the President must be selected from among the directors, and since Section II, Table I of the application form indicated

that the President was not a director, an explanation was requested; that the applicant responded by amending its application thus making the President the fourth director; however, Section 1, Article III provides for a total of only three directors; and

IT FURTHER APPEARING, That by letter received April 29, 1960, Radio Danville, Incorporated (WDTI) informed the Commission that it would accept a grant conditioned upon acceptance of interference from whichever of the three Waynesboro applications that were granted; and that WDTI would not cause interference to the WPET proposal (BP-11742), however, no interference study was submitted; and therefore, WPET, Inc. will be made a party to the instant proceeding with respect to its proposed operation; and

IT FURTHER APPEARING, That the Times-World Corporation (WDBJ), by letter received April 25, 1960, requested a hearing with regard to the WDTI application (BP-13618) on the ground that objectionable interference would be caused to its existing operation; and

IT FURTHER APPEARING, That the Commission is of the opinion that a hearing is necessary with regard to the WDTI application because of interference to Station WDBJ; and

IT FURTHER APPEARING, That after consideration of the foregoing and the applicants' replies, the Commission is still unable to make the statutory finding that a grant of the applications would serve the public interest, convenience, and necessity, and is of the opinion that the applications must be designated for hearing in a consolidated proceeding on the issues specified below;

[154]

IT IS ORDERED, That, pursuant to Section 309(b) of the Communications Act of 1934, as amended, the instant applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the

following issues:

1. To determine the areas and populations which would receive primary service from each of the above-captioned new proposals and the availability of other primary service to such areas and populations.
2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WDTI and the availability of other primary service to such areas and populations.
3. To determine the nature and extent of the interferences, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.
4. To determine whether the instant proposal of Station WDTI would cause objectionable interference to Station WDBJ, Roanoke, Virginia and BP-11742 (WPET) Greensboro, North Carolina, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.
5. To determine whether the interference received by each instant proposal from any of the other proposals herein and any existing stations would affect more than ten percent of the population within its normally protected primary service area in contravention of Section 3.28 (c)(3) of the Commission Rules and, if so, whether circumstances exist which would warrant a waiver of said Section.

[154]

6. To determine, in order to establish the financial qualifications of the applicant John Laurino, whether he has a bank loan of $10,000 for use in his Chester, Virginia proposal. In the event it is determined that such a loan is available to Mr. Laurino, whether it was excluded as part of his cash and liquid asset showing of $16,800 with respect to the instant proposal; and whether the bonds and other securities listed by Mr. Laurino with a market value of $25,000 are readily marketable.
7. To determine whether Music Productions, Incorporated, and James J. Williams are financially qualified to construct and operate their proposed stations.

[155]

8. To determine, in order to establish the financial qualifications of the partnership of Samuel J. Cole and J. R. Mims, Sr., d/b as Blue Ridge Broadcasters, whether J. R. Mims, Sr., d/b has sufficient cash or liquid assets to meet his 25% partnership commitment.
9. To determine whether the number of directors composing the Board of Directors of Music Productions, Inc., is in accordance with its bylaws.
10. To determine in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Danville, Virginia or Luray, Virginia, or one of the proposals for Waynesboro, Virginia would best provide a fair, efficient and equitable distribution of radio service.
11. To determine, in the event it is concluded pursuant to the foregoing issue that one of the proposals for Waynesboro, Virginia, should be favored, which of the proposals of John

Laurino, Music Productions, Inc., or James J. Williams would best serve the public interest, convenience and necessity in the light of the evidence adduced under the issues herein and the record made with respect to the significant differences between the said applicants as to:

a) The background and experience of each having a bearing on the applicant's ability to own and operate the proposed standard broadcast station.

b) The proposal of each with respect to the management and operation of the proposed station.

c) The programming services proposed in each of the said applications.

12. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

IT IS FURTHER ORDERED, That the Times-World Corp., Licensee of Station WDBJ, Roanoke, Virginia, IS MADE A PARTY to the proceeding with respect to its existing operation and that WPET, Inc. licensee of station WPET, Greensboro, N. Carolina, IS MADE A PARTY with respect to its proposed operation (File No. BP-11742).

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, each of the instant applicants and parties respondent herein, pursuant to Section 1.140 of the Commission Rules, in person or by attorney, shall, within 10 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

[156]

IT IS FURTHER ORDERED, That, the issues in the above-captioned proceeding, may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Acting Secretary

Released: December 15, 1960

[157]

FCC 61M-580
2851

MEMORANDUM OPINION AND ORDER

By James D. Cunningham, Chief Hearing Examiner:

1. The Chief Hearing Examiner has under consideration three joint petitions filed in the above-entitled proceeding pursuant to Section 311(c) of the Communications Act Amendments, 1960, for approval of agreements looking toward dismissal of the applications of John Laurino, James J. Williams and Blue Ridge Broadcasters. Music Productions, Incorporated, is a joint petitioner with each of the dismissing applicants, and it will pay Laurino and Blue Ridge Broadcasters $1250 and $1000, respectively, as partial reimbursement of expenses incurred in connection with their applications; and, in the case of Williams, a merger is contemplated whereby this applicant will acquire a 20% stock interest in Music Productions. The latter's application is proposed to be amended to reflect the merger. During

oral argument heard on these pleadings, additional information and detailed explanations were presented regarding the negotiations of the parties. It was understood that a further request by Music Productions to amend its application by adopting certain of the engineering phases of the Williams' application would be disregarded at this time. The Commission's Broadcast Bureau supports the petitions and has expressed the view that the three agreements are consistent with the statute cited and may be approved.

[158]

2. The five applications in this consolidated proceeding seek the use of the frequency 970 kilocycles, viz., Laurino, Music Productions, and Williams are for Waynesboro, Virginia; Radio Danville, Incorporated, is for Danville, Virginia; and Blue Ridge Broadcasters is for Luray, Virginia. They were designated for hearing by order of the Commission released December 15, 1960 (FCC 60-1491; Mimeo No. 97331). Negotiations leading to the settlement agreements here under consideration commenced in December 1960, immediately after issuance of the designated order, when Blue Ridge Broadcasters sought "to arrange a merger or buy out which could result in the Blue Ridge application for Luray being granted." No understandings were reached on this occasion. Following a prehearing conference held in the proceeding on January 12, 1961, a general discussion for settlement was held by the parties, at which time Blue Ridge Broadcasters offered to merge with Williams. This was rejected. Several weeks later, the principal of Music Productions made known "that he was not interested in dismissing the Productions' application, that he would consider paying the expenses of any dismissing applicant, that he did not want to dilute his equity by taking two or three partners, but that as far as Williams was concerned, he would consider

a merger with him since he liked the idea of having a partner in Waynesboro where Williams lives." Whereupon, Blue Ridge Broadcasters and Laurino entered into agreements with Music Productions on March 1 and March 3, 1961, respectively,, to dismiss their applications upon reimbursement of expenses incurred in connection with their applications; and on February 23, 1961, Music Productions and Williams agreed to a merger. As indicated above, under these agreements Music Productions will pay Laurino $1250 and Blue Ridge Broadcasters $1000, as partial reimbursement of the expenses incident to their applications, and Williams will acquire a 20% stock interest in Music Productions.

3. The parties have complied satisfactorily with the requirements of Section 1.316 of the Rules in the matter of furnishing the necessary details relative to their agreements. It is established that at least to the extent of $1250 in the case of Laurino and $1000 in the case of Blue Ridge Broadcasters, expenditures of these sums were reasonably necessary in connection with the preparation, filing and advocating the granting of the applications involved, and, therefore, they are found to have been made legitimately and prudently, within the meaning of Section 311 (c) of the Communications Act Amendments, 1960. There is no indication of bad faith by any of the parties to these agreements with reference to the negotiations here involved or in connection with the filing and prosecution of their applications, and it appears that public benefits will result from the approval of these agreements which are hereby found to be consistent with the public interest, convenience and necessity.

4. While it is appropriate to act favorably upon the instant joint petitions to the extent that they seek approval of the agreements aforementioned, as suggested by the Commission's Broadcast Bureau, "good cause",

within the meaning of Section 1.312(c) of the Rules, cannot here be found to exist which would warrant dismissal of the Laurino, Williams and Blue Ridge Broadcasters applications other than with prejudice. However, in this behalf, it is to be understood that with reference to the application of Williams, dismissal thereof with prejudice shall not operate as a bar to the effectuation of the merger agreement hereinafter approved between Williams and Music Productions, and, to this extent, the provisions of Section 1.309(a) of the Rules are hereby waived.

ACCORDINGLY, IT IS ORDERED, this 3rd day of April 1961, that the three joint petitions for approval of agreements, filed pursuant to Section 311(c) of the Communications Act Amendments, 1960, are granted; that the said agreements are approved; that the application of Music Productions, Incorporated, is amended to show that James J. Williams hold a 20% stock interest therein; and that the applications of John Laurino, James J. Williams and Blue Ridge Broadcasters are dismissed with prejudice. IT IS FURTHER ORDERED, that the applications of Music Productions, Incorporated, and Radio Danville, Incorporated (WDTI), are retained in hearing status and will be the subjects of further proceedings and an initial decision by the presiding Hearing Examiner.

FEDERAL COMMUNICATIONS COMMISSION, James D. Cunningham
Chief Hearing Examiner

Ben F. Waple
Acting Secretary

Released: April 3, 1961

[160]

[160]

Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington 25, D.C.

FCC 61D-54
3679

In re Applications of	)	
RADIO DANVILLE,INCORPORATED (WDTI) Danville, Virginia	)	DOCKET NO. 13892 File No. BP-13618
MUSIC PRODUCTIONS, INCORPORATED Waynesboro, Virginia	)	DOCKET NO. 13893 File No. BP-13714
For Construction Permits	)	

Appearances

Vincent A. Pepper (Smith & Pepper) on behalf of Radio Danville, Incorporated; E. Theodore Mallyck (Mallyck & Bernton) on behalf of Music Productions, Incorporated; and Richard M. Riehl on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

Preliminary Statement

In its Order of December 7, 1960, released December 15, 1960, the Commission initially designated the above applications for consolidated hearing with the applications of John Laurino, et al. (Docket No. 13891, et al.). However, on April 3, 1961, the Chief Hearing Examiner, after oral argument on March 30, 1961, granted the petitions of John Laurino and Samuel J. Cole and J. R. Mims, Sr., d/b as Blue Ridge Broadcasters, approved their respective agreements with Music Productions, Incorporated to withdraw from the proceeding and dismissed their applications with prejudice. Additionally, in the Same Order, the Chief Hearing Examiner approved the merger agreement between James J. Williams and Music Productions, Incorporated and dismissed the James J. Williams application

with prejudice. This proceeding, therefore, involves only the application of Radio Danville, Incorporated (WDTI) which seeks a construction permit to change the facilities of Station WDTI operating on 970 kc by increasing the daytime power from 500 watts to 1 kilowatt; and the application of Music Productions, Inc. which seeks a construction permit for a new standard broadcast station at Waynesboro, Virginia to operate on 970 kilocycles with a power of 500 watts; daytime only.

[161]

In the above-mentioned Order, the Commission found both Radio Danville, Incorporated (hereinafter called Radio Danville) and Music Productions, Incorporated (hereinafter called Music Productions) technically and otherwise qualified; Radio Danville legally and financially qualified, but could not determine at that time that Music Productions was legally and financially qualified. The dismissal of the John Laurino, James J. Williams and Blue Ridge Broadcasters applications rendered moot Issues 5, 6, 8, 11 and that part of Issue 7 which pertains to James J. Williams. The remaining issues which are here applicable are as follows:

1. To determine the areas and populations which would receive primary service from each of the above-captioned new proposals and the availability of other primary service to such areas and populations.
2. To determine the areas and populations which may be expected to gain or lose primary service from the proposed operation of Station WDTI and the availability of other primary service to such areas and populations.
3. To determine the nature and extent of the interference, if any, that each of the instant proposals would cause to and receive from each other and all other existing standard broadcast

[161]

stations, the areas and populations affected thereby, and the availability of other primary service to the areas and populations affected by interference from any of the instant proposals.

4. To determine whether the instant proposal of Station WDTI would cause objectionable interference to Station WDBJ, Roanoke, Virginia and BP-11742 (WPET), Greensboro, North Carolina, or any other existing standard broadcast stations, and, if so, the nature and extent thereof, the areas and populations affected thereby, and the availability of other primary service to such areas and populations.

7. To determine whether Music Productions, Incorporated . . . are (is) financially qualified to construct and operate their (its) proposed stations.

[162]

9. To determine whether the number of directors composing the Board of Directors of Music Productions, Inc., is in accordance with its bylaws.

10. To determine in the light of Section 307(b) of the Communications Act of 1934, as amended, whether the proposal for Danville, Virginia or Luray, Virginia, or one of the proposals for Waynesboro, Virginia would best provide a fair, efficient and equitable distribution of radio service.

12. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if any, of the instant applications should be granted.

With the dismissal of the above-mentioned applications, a 307(b) choice among the cities involved became unnecessary, and consequently no testimony was adduced with respect to the nature and character of the communities.

Since it appeared that the proposal of Radio Danville would cause objectionable interference to the present operation of Station WDBJ and the proposed operation of Station WPET,[1/] the Commission made the Times-World Corp., licensee of Station WDBJ, Roanoke, Virginia and WPET, Inc., licensee of Station WPET, Greensboro, North Carolina, parties to the proceeding.

A prehearing conference was held on January 12, 1961, and the hearing session on March 13, 1961. The record was closed on April 17, 1961 by Order of the Hearing Examiner.[2/]

1/ The Radio Danville proposal was not timely filed with that of Station WPET (BP-11742) and consequently the WPET proposal is considered as an existing operation in this proceeding with respect to electrical interference.

2/ The record was held open at the conclusion of the hearing on March 13, 1961 to await action by the Chief Hearing Examiner on the petitions of the dismissing parties discussed, supra, and the subsequent amendment of the Music Productions application.

[163]

Findings of Fact

Radio Danville, Incorporated (WDTI), Danville, Virginia

(Has: 970 kc, 500 w, D, Class III;
Req: 970 kc, 1 Kw, D, Class III)

1. According to the 1960 U. S. Census, Danville, Virginia has a population of 46,577 (1960 U. S. Census (PC (A1)-48)). The community lies near the center of the Virginia-North Carolina state line. Besides Station WDTI, three other stations are assigned to Danville, namely, WDVA (1250 Kc, 1 Kw, 5 Kw-Ls, Da-N, U); EBTM (1330 Kc, 1 Kw, 5 Kw-LS, Da-N, U); WILA (1580 Kc, 1 Kw, D).

[163]

2. Based on an effective field (unattenuated at one mile) of 180 mv/m for one kilowatt power and on ground conductivity values for the area taken from Fig. M-3 of the Rules, employing 1960 U. S. Census data, the coverage is as follows:

Contour (mv/m)	Population	Area (sq. mi.)	Population	Area (sq.mi.)
2.0	86,741	616	99,237	900
0.5 (norm. protected)	167,992	2,288	207,176	3,080
Interference from Music	--	--	574 (o.27%)	12.5(0.4%)
Interference-free	167,992	2,288	206,602	3,067
Gain	--	--	38,610	779

*Percentages refer to population and area within the normally protected contour.

3. Stations WPTV, WDVA and WBTM provide primary service (0.5 mv/m or greater) to all of the rural area that would gain primary service of Station WDTI; 28 others serve portions and a minimum of 5 and a maximum of 20 stations provide such service to any portion thereof. A minimum of 5 and a maximum of 6 stations provide such service to any portion of the area of objectionable interference received by this proposal from the proposal of Music Productions.

4. Based on field intensity measurements of Station WDBJ, Roanoke, Virginia (960 kc, 5 Kw, Da-N, U, Class III) in the directions of 137, 147 and 157 degrees true, no objectionable interference would be caused by proposed Station WDTI to Station WDBJ. Any objectionable interference that might be caused to Station WPET, Greensboro, North Carolina (950 Kc, 500 w, D, Class III) would fall in an area which is under interference from Station WXGI. No objectionable interference would be caused to any other existing standard broadcast stations.

[164]

Music Productions, Incorporated, Waynesboro, Virginia
Req: 970 Kc, 500, D, Class III)[3/]

5. According to the 1960 U. S. Census, Waynesboro, Virginia has a population of 15,694. The community lies some 22 miles west of

Charlottesville, Virginia center to center. Station WAYB (1490 Kc, 250 w, U. Class IV) is the only standard broadcast station assigned thereto.

6. Based on an effective field (unattenuated at one mile) of 132 mv/m and on ground conductivity values for the area taken from Fig. M-3 of the Rules, employing 1960 U. S. Census data, the coverage is as follows:

Contour (mv/m)	Population	Area (sq. mi.)
2.0	33,298	346
0.5 (normally protected)	71,427	1,194
Interference from proposed WDTI	1,930 (2.7%)*	59 (4.97%)
Interference-free	69,497	1,135

*Percentages refer to population and area within the normally protected contour.

7. Station WSVA provides primary service (0.5 mv/m or greater) to all of the rural area that would be served by the proposal of Music. Eight others service portions and a minimum of 2 and a maximum of 7 stations provide such service to any portion thereof. Areas totalling 229.3 square miles, including 9,216 persons, now receive 3 services and an area of 11.3 square miles, including 331 persons, receives 2. A minimum of 2 and a maximum of 4 stations provide such service to the area of interference received by the Music proposal from proposed Station WDTI.

8. Stations WAYB, Waynesboro, WAFC, Staunton, and WSVA, Harrisonburg, Virginia provide primary service (2.0 mv/m or greater) to the city of Waynesboro, Virginia.

3/ After approval of the Music Productions and Williams merger agreement, supra, Music Productions amended its application, in part, adopting the antenna site and engineering of Williams. These findings are based on that amendment and the exhibit submitted thereunder.

Financial Qualifications of Music Productions

9. The total capital requirement of Music Productions for its proposal (as amended) is as follows: [4]

Transmitting, antenna, monitoring, and studio technical equipment	$ 16,000
Acquiring land .	3,000
Building	3,500
Legal Engineering and Miscellaneous	4,600 [5]
Three months operating capital	16,500
Total	$ 44,200

To meet these requirements, Music Productions has available capital in the amounts and from the sources set forth below:

Cash (in excess of)	$ 3,000
Loan from Mr. Robert Rogers	30,000
Deferred Equipment Credit	12,450
Total	$ 45,450

In the order designating the subject application for hearing it was recited that the financial statement of Robert Rogers failed to show sufficient current and liquid assets to meet his $30,000 loan commitments. An unaudited balance sheet of Mr. Rogers, as of February 1, 1961, shows cash in excess of $45,000, loan value of life insurance of $3,200, and current liabilities in the amount of $820.00, leaving Mr. Rogers net cash and liquid assets in excess of $47,380 available to honor his loan commitment of $30,000.

Legal Qualifications of Music Productions

10. Issue number 9 of the Commission's order of designation seeks to determine whether the number of directors of Music Productions is in accordance with the provision of its by-laws. Music Production's

4/ After the dismissal of the Laurino, Blue Ridge and Williams applications, Music Productions amended its application to reflect the change in its financial plans resulting from these dismissals. These were a decrease in the cost of transmitter site, and an increase in miscellaneous expenses resulting from Music Production's adoption of the Williams site (3/) and partial reimbursement of Laurino and Blue Ridge expenses.

5/ Includes $2,200 to dismissing applicants John Laurino and Blue Ridge Broadcasters.

[166]

amended application and the exhibit submitted thereunder show that the number of directors in the application and provided for in the amended by-laws is four.6/

Conclusions

1. Radio Danville, Incorporated proposes to increase power from 500 watts to 1 kilowatt and to continue operation as a Class III station on 970 kilocycles, daytime only, at Danville, Virginia. Music Productions, Incorporated requests a new facility at Waynesboro, Virginia on 970 kilocycles with 500 watts power, daytime only. Except as to matters specified in the issues herein, both applicants have previously been found technically and otherwise qualified; Radio Danville was found legally and financially qualified; but Music Productions, Incorporated was not previously found to be legally and financially qualified. As shown by the findings herein, interference involved between the proposals is relatively small, other services are available in the proposed interference areas, and both proposals would comply with Section 3.28(c) of the Rules - the so-called 10% Rule - in that interference received population-wise is less than 10% the loss to WDTI amounting to less than 1% and that to Music Productions less than 3%. Simultaneous operation of the proposals is feasible and, as indicated infra, grant of both applications would serve the public interest.

[166]

2. No objectionable interference would be caused by proposed Station WDTI to Stations WDBJ, WPET or any other existing standard broadcast stations. Similarly, no objectionable interference would be caused by the Music Productions proposal to any existing standard broadcast stations.

3. With regard to the financial qualifications of Music Productions, the facts show cash, credit, and loans available in the amount of $45,450 to meet the capital requirements of $44,200 necessary to construct the proposal and operate it for a reasonable period of time. The facts further show that Mr. Rogers has net cash and liquid assets of at least $47,380 with which to meet his loan commitment to Music Productions of $30,000. Therefore, since Mr. Rogers has sufficient funds to meet his loan commitment and with this loan Music Productions show capital available in excess of that required, we conclude that Music Productions is financially qualified.

6/ The last portion of the Music Production amendment referred to previously in 3/and 4/merely reflected an amendment of the company's by-laws to bring them into line with Table I of Section II of Form 301. This entire amendment was accepted after hearing had commenced.

[167]

4. By virtue of a subsequent amendment, the number of directors of Music Productions is in accordance with its by-laws and since no other questions were raised as to the legal qualifications of Music Productions, we conclude that it is legally qualified.

5. In view of the foregoing, it is concluded that the applications of Radio Danville, Incorporated and Music Productions, Incorporated should be granted.

Accordingly, IT IS ORDERED, this 20th day of April, 1961, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.153 of the Rules, the applications of Radio Danville, Incorporated (WDTI), Danville, Virginia, to change the facilities of Station WDTI by increasing the daytime power from 500 watts to 1 kilowatt, and Music Productions, Incorporated, for a new standard broadcast station at Waynesboro, Virginia, to operation on 970 kilocycles with a power of 500 watts, daytime only, BE AND THEY ARE HEREBY GRANTED.

Charles J. Frederick
Hearing Examiner
Federal Communications Commission

Released: April 21, 1961
and effective 50 days thereafter,
subject to the provisions of the
Rule [1.153] cited in the ordering
clause above. Exceptions, if any,
must be filed within 30 days of the
release date unless an extension
is duly granted.

60B

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MUSIC PRODUCTIONS, INC.,

Intervenor.

Appeal from a Memorandum Opinion and Order
of the Federal Communications Commission

KEITH E. PUTBRESE
THOMAS W. FLETCHER

Smith & Pepper
1111 E Street, N. W.
Washington 4, D. C.

Counsel for Appellant.

November 19, 1963

STATEMENT OF QUESTIONS PRESENTED*

1. Whether the Commission made sufficient and adequate findings upon which to base a conclusion that the application for an extension of time in which to construct Station WBVA should either be granted, designated for hearing, or denied.

2. Whether the Commission's conclusion that the application for an extension of time in which to construct Station WBVA should be granted, was supported by adequate findings and evidence.

3. Whether the Commission should have found and concluded that the application for an extension of time in which to construct Station WBVA was not necessitated by causes beyond the control of the permittee or based upon good cause shown in view of the verified allegations and factual evidence of record.

4. Whether the Commission's failure to conclude that, as a matter of law, Intervenor had abandoned its construction permit, is contrary to principles established by previous Commission decisions, as well as Decisions of this Court.

5. Whether the Commission should have designated the application for an extension of time in which to construct Station WBVA for evidentiary hearing in order to determine whether the subsequent transfer of 49.5% of the stock of the permittee corporation constituted an unauthorized transfer of control, particularly in view of the verified allegations that Intervenor had (a) first unsuccessfully attempted to sell its construction permit, (b) advised the Commission that the major stockholder of the permittee corporation did then, and does presently, have other commitments which did and will preclude participation in the construction and operation of the station, and (c) following dismissal of the

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* Counsel for the parties agreed to the above questions in a Prehearing Stipulation submitted to the Court on October 22, 1963.

application to sell 100% of the construction permit, transferred 49.5% of the stock of the permittee corporation to a stranger, which person would be the only stockholder with residence in Waynesboro, Virginia.

6. Whether the Commission should have denied or designated for hearing the application for an extension of time in which to construct Station WBVA, in view of the Commission's finding that Intervenor had materially deviated from the terms of a merger agreement previously approved by the Commission, without obtaining prior Commission consent pursuant to the provisions of Section 311(c) of the Communications Act, in order to inquire into all of the circumstances surrounding the transaction involved.

7. Whether, in view of Intervenor's failure to construct the authorized facilities, the verified allegation that its major stockholder represented that he would have no time to devote to the construction or operation of the station, Intervenor's attempt to dispose of the construction permit, and the subsequent transfer of stock in the permittee corporation to a third person, the Commission should have designated the application for an extension of time in which to construct Station WBVA for hearing to determine whether the various applications and transactions involved constituted an abuse of the Commission's processes, or should have denied the extension application in order to provide an opportunity for other qualified applicants to file for the same or comparable facilities.

INDEX

TABLE OF AUTHORITIES CITED

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MUSIC PRODUCTIONS, INC.,

Intervenor.

Appeal from a Memorandum Opinion and Order
of the Federal Communications Commission

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal taken pursuant to the provisions of Section 402 (b) (6) of the Communications Act of 1934, as amended, 66 Stat. 7718 (1952), 47 U.S.C. § 402 (b) (6) by Waynesboro Broadcasting Corporation[1] from a Memorandum Opinion and Order of the Federal Communications

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[1] Hereinafter referred to as "Appellant". The Federal Communications Commission will be referred to as "Appellee" or "Commission". Intervenor, Music Productions, Inc., will be referred to as "Intervenor" or "Music Productions".

Commission released August 2, 1963 (R. 121-126)[2] which (a) granted, without hearing, an application for modification of construction permit (R. 43-45) filed by Intervenor for a second extension of authority to construct Station WBVA at Waynesboro, Virginia, and (b) rejected a "Petition to Deny Applications" (R. 55-70) filed by Appellant against that Application and against another Application also filed by Intervenor requesting Commission approval to the assignment of the construction permit to a W. Courtney Evans (R. 1-40).[3] (Commissioner Bartley dissented to the action.) Appellant filed its Notice of Appeal on September 3, 1963.

STATEMENT OF THE CASE[4]

Intervenor corporation filed an application for a new standard broadcast station at Waynesboro, Virginia on December 8, 1959 (File No. BP-13714). Its sole stockholders, at that time, were M. Robert Rogers (60%) and his wife, Teresa S. Rogers (40%). The application was subsequently designated for consolidated hearing with two other mutually exclusive applications proposing similar facilities at Waynesboro, a mutually exclusive application proposing similar facilities at

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[2] Pursuant to Stipulation of Counsel for all parties a Joint Appendix will be filed subsequent to this Brief. Thus, references herein are to the record only, indicated by "(R.)."

[3] The assignment application was dismissed shortly after the filing of the "Petition to Deny Applications". As discussed, infra, although the dismissal rendered moot, in part, the Petition to Deny Applications, the circumstances surrounding the filing and subsequent dismissal of the assignment application are relevant considerations with respect to the issues presented by this Appeal.

[4] Since the questions presented by this Appeal relate, in substantial part, to the Commission's failure to (a) respond to Appellant's Petition, and (b) to make sufficient and adequate findings upon which to base its conclusions, the Statement of the Case herein does not include a detailed analysis of the issues raised by Appellant in its Petition or its Reply; nor a detailed analysis of the Commission's Memorandum Opinion and Order. It has been deemed necessary and logical to cover those matters in detail in Appellant's Arguments. Accordingly, it is believed that the convenience of this Court will better be served by avoiding repetition.

Luray, Virginia, and an application of the licensee of Station WDTI to increase power at Danville, Virginia.

Shortly after designation for hearing, Intervenor advised the Commission that it had entered into separate agreements with one of the other Waynesboro applicants and the Luray applicant whereby Intervenor would reimburse them $1,500 and $1,000, respectively, to dismiss their applications, and would then merge with the remaining Waynesboro applicant — the latter to receive an option to acquire 20% of the stock of a new corporation to be formed.

Oral argument on the proposals was heard and, by Memorandum Opinion and Order of the Chief Hearing Examiner released April 3, 1961, the buyouts and merger were permitted. In so doing the Chief Hearing Examiner Ordered that Intervenor's application be amended to show that James J. Williams (the applicant which merged with Intervenor) held a 20% stock interest therein.

Shortly thereafter — on April 21, 1961 -- an Initial Decision was released granting Intervenor's Application. That Decision became a Final Decision by operation of law on June 12, 1961. By law, the station should have been ready for operation in 8 months.

Approximately 8 months later, on February 6, 1962, Intervenor filed an application for modification of construction permit to extend its authority to construct the facilities to August 1, 1962. For reasons not specified, the Commission extended the construction date to October 1, 1962.

On September 10, 1962 Intervenor filed an application requesting the Commission's consent to assign the construction permit to W. Courtney Evans (R. 1-40). On September 25, 1962 a second application for modification of construction permit was filed requesting an extension of time in which to complete construction to April 1, 1963. The basis of the request was to permit action on the assignment application.

Appellant's "Petition to Deny Applications" was directed against both the application for an extension of time and the application for assignment of the construction permit (R. 55-70). Shortly after the filing of the Petition, however, the application for assignment of the permit was dismissed by counsel for Intervenor (R. 71). Shortly thereafter, Mr. Rogers entered into an Agreement with Mr. Louis Spillman, Editor and Publisher of the Waynesboro, Virginia newspaper, wherein Mr. Spillman acquired 49.5% of the issued stock of Music Productions. Mrs. Rogers retained no stock.[5] Since the transfers involved did not entail any mathematical change in corporate "control", no application was required under the Commission's rules to be filed to secure prior Commission approval thereto. The Commission did, of course, have jurisdiction over the matter. In later granting the extension application, however, the Commission implicitly approved the transfers.

STATUTES AND THE REGULATIONS INVOLVED

Pertinent portions of the provisions of the Communications Act of 1934, as amended, together with the applicable Commission Rules and Regulations, are set forth in the Appendix hereto.

STATEMENT OF POINTS[6]

(1) Appellee failed to make sufficient and adequate findings upon which to base a conclusion that the application for an extension of authority to construct Station WBVA should either be granted, designated for hearing, or denied, and failed to require the "proper showing"

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[5] 100 shares of the stock of Music Productions had previously been issued. 60 were held by Mr. Rogers and 40 by Mrs. Rogers. As part of the above transaction, Mrs. Rogers transferred her stock to Mr. Rogers. The Corporation then issued an additional 98 shares of its authorized (but previously unissued) capital stock to Mr. Spillman, giving him a 49.5% interest in the corporation. The issuance of even two more shares to Mr. Spillman would have necessitated the filing of another application requesting Commission approval to the transaction.

[6] Appellant has combined its Argument so that Point No. 1 is responsive to Questions 1, 2, 3 and 4; Point No. 2 is responsive to Question 5; and Point No. 3 is responsive to Questions 6 and 7.

required by Section 319(b) of the Communications Act and Sections 1,314 and 1.323(a) of its Rules. Moreover, Appellee's failure to conclude that, as a matter of law, Intervenor had abandoned its construction permit by, among other matters, attempting to dispose of it, disregarded principles established by legal precedent.

(2) Appellee's failure to find and conclude that the transfer of 49.5% of the stock of Music Productions required an evidentiary hearing to determine whether control was, in actuality, also concurrently transferred, was arbitrary and capricious.

(3) Appellee's failure to conclude that Intervenor's violation of the provisions of Section 311(c) of the Communications Act, and the terms of an Order of the Chief Hearing Examiner, required denial of the application for an extension of construction authority was arbitrary and capricious. At the least, the Commission should have ordered an evidentiary hearing permitting inquiry into those matters, as well as other related applications, transactions and representations, for the purpose of determining whether Intervenor possesses the requisite character qualifications to be a Commission licensee, and whether the public interest would better be served by permitting the filing of other applications for the facilities in order to secure a more qualified licensee.

SUMMARY OF ARGUMENT

I

The Commission failed to even review or examine the facts of record — however limited and scant — in determining to grant Intervenor's application for an extension of authority to construct the facilities authorized, and failed to make one single nominal finding — not even an incorrect one — upon which to base a conclusion that a grant of the application would be consistent with applicable provisions of the Communications Act and its own rules. Moreover, the only facts of

record (which were ignored in the Commission's Memorandum Opinion and Order) compel a contrary conclusion — the requested extension was neither based upon matters beyond Intervenor's control nor upon a "proper showing" of good cause. In fact, the Commission should have concluded, as a matter of law, that Intervenor had abandoned any "lingering possibility" of ultimately constructing the facilities, as evidenced by the representation of its own principal stockholder that he had, and has, no time to devote to the construction or operation of the station, and the fact that Intervenor used that representation to support a since dismissed application to sell the construction permit to a third party. Moreover, the second application for an extension was filed for no other purpose but to preserve the permit long enough to permit Intervenor to dispose of it. Such a purpose is totally inconsistent with the provisions of Section 319(b) of the Communications Act or Sections 1.314 and 1.323(a) of the Commission's Rules. Finally, the Commission's unsupported (and unsupportable) action in granting the extension merely compounded the capricious nature of its handling of Intervenor's applications. The Commission consistently has failed to require of Intervenor the showing (in support of the requested extensions) required by Section 1.323(a) of its rules.

II

The application requiring consent to sell the construction permit to W. Courtney Evans was dismissed shortly after the filing of the Petition to Deny Applications submitted on behalf of Appellant. That Petition raised questions concerning certain representations made by both the Intervenor and the proposed Assignee (R. 62-70). Subsequent to the dismissal, however, Intervenor, by the issuance of additional stock, transferred 49.5% of the ownership to Mr. Louis Spillman, Editor and Publisher of the only newspaper in Waynesboro. In so doing, Intervenor was reimbursed for approximately one-half of the expenses incurred in (a) securing the construction permit, (b) in "buying out" the other

former applicants for the facilities, and (c) in illegally buying out the applicant which had "merged" with Intervenor (See R. 3 and 17-18 for listing of expenses; R. 83-85 for details of letter Agreement). Moreover, Mr. Spillman agreed to loan Music Productions substantial additional monies for construction purposes — approximately double the amount which Mr. Rogers has agreed to loan the corporation. Thus, it is obvious that the major financial responsibility for the construction and operation of the station will fall on Mr. Spillman — the 49.5% stockholder.

The foregoing considerations, measured against the facts that Intervenor never took any actual physical steps toward constructing the station; never acted in accordance with its merger agreement; subsequently attempted to dispose of the construction permit; in so doing, represented that its principal stockholder had no time to devote to construction or operation; and then, following failure to secure approval to the assignment application, transferred stock to a stranger who assumed the major financial responsibility for constructing the station, raises a reasonable presumption that actual control has or will devolve on the new stockholder. The transfer of 49.5% of the ownership also raises a substantial question whether the purpose of restricting the stock issuance to less than 50% was to avoid the filing of an application which would require Commission analysis and approval. The Commission's disposition of these matters, however, was based solely upon the fact that "Mrs. Rogers" has broadcast and management experience and that, accordingly, there is no basis to conclude that control would devolve on Mr. Spillman. This answer, however, fails to consider that Mrs. Rogers had transferred her entire stock to Mr. Rogers. Moreover, the Commission failed to inquire or determine whether Mrs. Rogers would move to Waynesboro, leaving her husband behind, or construct and operate the station by long distance telephone.

III

The only matter concerning which the Commission made findings of any significance relates to Intervenor's violation of the provisions of Section 311(c)(3) of the Communications Act. As previously noted, Intervenor's application was only granted following dismissal, pursuant to payment, of the mutually exclusive application for Luray, Virginia; one of the competing applications for Waynesboro; and upon merger with the remaining Waynesboro applicant. At that time, the Commission's Chief Hearing Examiner had authority to permit such action should it be concluded that the action was consistent with public interest considerations. The Commission has since, however, promulgated rules which, in such a case, would have permitted other applicants to file for the same facilities in Luray. While that rule did not obtain at the point of time under consideration, it does constitute an expression of a Commission policy to effectuate the fair, efficient and equitable mandate of Section 307(b) of the Communications Act.

In any event, however, the Chief Hearing Examiner's approval to the arrangements was obviously secured on the basis of the dismissal and merger agreements actually before him at that time. Among other matters, the approval was granted on the theory that construction would be timely concluded, and it was also Ordered that Intervenor's application be amended to reflect the merger (R. 159). Moreover, it may reasonably be assumed that the arrangements were not approved on the theory that Intervenor would later attempt to dispose of the permit. As it turns out, construction was <u>not</u> timely concluded. Intervenor did <u>not</u> amend its application to reflect the merger Agreement. Intervenor <u>did</u> attempt to dispose of the permit. In so doing, Intervenor disregarded the Chief Hearing Examiner's Order; violated the provisions of Section 311(c) of the Communications Act; advised the Commission that its principal stockholder had no time to devote to the proposed station; and transferred a 49.5% ownership interest to a person -- who may be

extremely competent and capable -- but who, as owner of the Waynesboro newspaper, would have been an impossible comparative handicap in a comparative hearing as a principal of any one of the applicants previously involved.

The Commission properly concluded, albeit understated, that "material deviations" from the terms of the approved agreements occurred, and that the changes were not anticipated by the Chief Hearing Examiner (R. 124). But while the Commission might justify and waive the contravention of Section 311(c) on a theory of "innocence of intention", if that were the only matter under consideration, it can hardly justify Intervenor's failure to comply with the clear Order of the Chief Hearing Examiner to amend its application to reflect the merger Agreement on the theory that it does not expect such sophistication of its licensees. It cannot justify the payment of an improper consideration (following the merger) on the same theory. And there is no apparent explanation for the Commission's failure to inquire whether the total facts and circumstances involved did not warrant a full inquiry into the qualifications of Intervenor, and into the greater policy question of whether public interest considerations require that qualified applicants be permitted to file for the facilities.

ARGUMENT

I

Appellee failed to make sufficient and adequate findings upon which to base a conclusion that the application for an extension of authority to construct Station WBVA should either be granted, designated for hearing, or denied, and failed to require the "proper showing" required by Section 319(b) of the Communications Act and Sections 1.314 and 1.323(a) of its Rules. Moreover, Appellee's failure to conclude that, as a matter of law, Intervenor had abandoned its construction permit by, among other matters, attempting to dispose of it, disregarded principles established by legal precedent.

Following receipt of the Chief Hearing Examiner's approval to the "buyouts" and "merger" agreements previously discussed, Intervenor proceeded on through a pro forma hearing and, on April 21, 1961, an Initial Decision was released by the Hearing Examiner looking toward a grant of Intervenor's application.[7] The Initial Decision (R. 160-167) became Final by operation of law on June 12, 1961, and a construction permit issued to Intervenor.

Section 319(b) of the Communications Act provides that, when construction permits are issued by the Commission, such permits:

> ". . . shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee."

Section 1.314 of the Commission's Rules, implementing the foregoing statutory provision, provides:

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[7] The pro forma hearing involved the application to increase the power of Station WDTI in Danville, Virginia as well as Intervenor's application. The Hearing Examiner concluded, however, that the mutual interference proposed was not substantial and should not preclude a grant of both applications (R. 166).

> "Each construction permit will specify a maximum of 60 days from the date of granting thereof as the time within which construction of the station shall begin and a maximum of 6 months thereafter as the time within which construction shall be completed and the station ready for operation, unless otherwise determined by the Commission upon proper showing in any particular case." (Emphasis supplied.)

Section 1.323(a) of the Commission's Rules, which relates to applications for extensions of construction permits, provides:

> "(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701. The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an application will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than 30 days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, and upon a specific and detailed showing of other matters sufficient to justify the extension."

Pursuant to the above rules, Intervenor should have commenced construction by August 12, 1961, and construction should have been concluded, equipment tests conducted, and an application for license and program test authority filed prior to February 12, 1962. Alternatively, an application for an extension of time containing a "proper showing" to justify the extension should have been filed by January 12, 1962.

In actual fact, Intervenor did not file its first application for an extension of authority to construct the facilities until February 6, 1962 -- only six days before the construction permit was due to be forfeited.[8]

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[8] Intervenor's Application is not contained in the Index of Record. The above information was, however, set forth in Appellant's "Petition to Deny Applications", which petition was based upon Commission records. Those facts have not been disputed by either Appellee or Intervenor (See R. 61).

Intervenor's application did not recite whether construction had been commenced within the required 60 day period. It did not describe any steps whatsoever which may have been taken in constructing the authorized facilities. Instead, the application merely recited "an effort" was made [without describing what effort] to have the station in operation by September of 1961 in time for the "fall upswing in business", but that the effort had proved to be unsuccessful. The application further recited that a ". . . decision was then made to postpone the construction of the facility until the Spring of 1962" and that it was ". . . anticipated that the station [would] be constructed and placed into operation sometime [the following] summer."

While the application requested an extension only to August 1, 1962, the Commission extended the date to October 1, 1962 (R. 61).

There are no further developments reflected in the Commission's records until September 10, 1962 whereupon an application was filed by Intervenor requesting the Commission's consent to an assignment of the construction permit to W. Courtney Evans (R. 1-40). In this regard, it is noted that the assignment application was filed subsequent to the August 1, 1962 date which had been specified by Intervenor as the date by which construction of the facilities was to be completed following the first six months extension period.

Shortly thereafter, the second application for modification of construction permit to extend the completion date was filed – on September 25, 1962 (R. 43-45). The Petition to Deny Applications was directed against both the assignment application and the application for an extension of time.

It is noted that the filing of the application for an extension again took place only shortly before the construction permit was due to expire. The second application for an extension also failed to note whether any construction had commenced within the 60-day period required by law. Moreover, no specific details were supplied concerning any steps

actually having been taken toward constructing the facilities, although a generalized recitation was set forth that Intervenor had purchased the transmitter site and had leased studio space (R. 44). Moreover, in response to Question No. 3 of the Application Form — requiring information concerning the reason construction could not be completed within the time specified — Intervenor merely made reference to the fact that one extension had been granted, and that while the extension application was pending, the principal stockholder of Intervenor had accepted a position ". . . which made it impossible for him to devote to the station the time required for its construction and initial operation." It was further recited that, accordingly, ". . . on September 10, 1962, an application was filed with the Commission to assign the CP for WBVA to W. Courtney Evans (File No. BAP-607)."

Intervenor's "response" to the "reasons" why construction could not be completed then concluded with the request that, "under these circumstances, Music Productions, Incorporated requests an additional six months' extension of its CP to enable the assignee, after Commission approval, and consummation, to construct and place Station WBVA into operation." (Emphasis supplied.) (R. 45)

As a corollary, it is noted that the application for assignment of the construction permit also recited the following:

> "Assignor's principal has accepted employment responsibilities as Manager of the National Symphony Orchestra which preclude his devoting time and attention necessary for building station and putting it on the air." (R. 2)

It is obvious that, as of the time of the filing of the extension application, Intervenor had totally abandoned any intention to construct and operate the authorized facilities. It is also obvious that the application had the sole purpose of "preserving" the construction permit for a sufficient time to permit the Commission to take action with respect to the assignment application in order that Intervenor could be reimbursed,

not only for the expenses incurred in securing the construction permit, but for the expenses incurred in buying out other applicants — including the improper payment to Mr. Williams in connection with his 20% interest in the permit (see R. 17-25 for the consideration to be paid for the permit).[9]

Intervenor's extension application is totally devoid of any details which would reflect that any actual construction had taken place during the entire period of time that the permit had been outstanding. Indeed, the entire record is devoid of any such necessary information. In this regard, in its Opposition to Appellant's Petitions to Deny Applications, Intervenor implicitly admitted that no construction had taken place. The Opposition did recite that ". . . this is by no means a situation where no steps have been taken or obligations incurred with respect to construction. MPI [Intervenor] has acquired, through a subsidiary, the transmitter site designated in its construction permit and a studio lease" (R. 80).

Those "steps" are hardly consistent with Intervenor's representation in its first application for an extension to the effect that "an effort" was made to have the station in operation by September of 1961, and that the station would be constructed and placed into operation sometime before the following summer. Of even greater significance, however, is the fact that, on August 2, 1963, Intervenor filed an application with the Commission (R. 128-144) requesting modification of the construction permit to specify a tower and transmitter location entirely different from the tower and transmitter location which had been specified in its application and which is specified in the Commission's construction permit. The same application for modification also specified that the studio would be located at the new transmitter site (R. 132). In addition,

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[9] The matter of the unlawful payment to Mr. Williams is reviewed in further detail, infra.

a good deal of the equipment proposed in the August 2, 1963 application differs from that initially proposed and specified in the construction permit (R. 135-140).

In short, even to assume that Intervenor may have, at some point, acquired certain land and a lease which could be used for its transmitter site and studio, any nominal significance which might inure to this action has been rendered meaningless since, for all practical purposes, Intervenor is now proposing modified facilities — two years and two months following its receipt of a construction permit — and absolutely no steps have been taken which would implement the placing into operation the facilities involved.

It is submitted that the foregoing facts not only demonstrate that Intervenor failed to establish justification for the requested extension, but the Commission itself has failed to require the "proper showing" spelled out in its own rules. What constitutes a "proper showing" depends in part, of course, upon the guidelines established by case precedent. An analysis of the principles established by prior cases fully demonstrates, however, that Intervenor's record of performance falls far short of even the most minimal requirements. The following cases are applicable to the instant one:

Rollins Broadcasting, Inc., 19 Pike & Fischer RR 174a (1960). The permittee received an extension of time in which to construct authorized nighttime facilities to December 1, 1958. On October 30, 1958 a further extension was requested based upon the fact that the transmitter site would be unsatisfactory because of the possible re-routing of a highway. The permittee requested the extension because it felt it should not proceed with construction until the road matter was resolved, pointing out that it had received definite notice that the road-way might take part of its proposed transmitter site, and that highway authorities had already made inquiries concerning the value of the property in the area of the transmitter site. The Commission refused

to accept this as justification for a delay, however, and concluded (a) that the permittee had not been diligent in proceeding with construction and, (b) the circumstances were not caused by matters beyond the permittee's control within the meaning of Section 319 (b) of the Communications Act. The Commission, in denying the extension, stated:

> "It is clear from the findings that the applicant could go forward, if it so desired, but has elected to await the outcome of the highway placement. This is the applicant's business judgment and, however commercially prudent, it is quite unrelated to the public interest in the early institution of a nighttime increase in the power of Station KATZ."

Wrather-Alvarez, 17 Pike & Fischer RR 670 (1959). The permittee received a construction permit to construct a television station at Yuma, Arizona on January 25, 1956. Under the Commission's rules, construction should have been completed by September 25, 1956. A six-month extension was secured, however (to March 25, 1957), because of certain unforeseen difficulties encountered in connection with the antenna site and because daytime temperatures were such as to make it impossible to work. Thereafter, in February of 1957, the permittee petitioned to amend the Commission's Table of Television Assignments in order to reassign the same channel from Yuma to El Centro, California. A second application for an extension was then filed reciting that the permittee should not be compelled to go forward with construction when there was a "reasonable possibility" that the Commission would act favorably upon its request for reassignment of the channel to El Centro. The Commission designated the second application for hearing on the following issues: (1) to determine whether there had been a diligent effort to construct the facilities authorized by the permit, (2) to determine whether the applicant was prevented from commencing construction by causes not under its control, and (3) to determine whether an extension would serve the public interest. Following hearing, the Commission denied the application because construction had been delayed

primarily by the permittee's efforts to move the channel to a more attractive location. In so holding, the Commission gave considerable weight to the fact that no physical construction had taken place, pointing out that this is a factor which must be taken into consideration in determining whether there has been a bona fide attempt to comply with the requirements of a permit.

Wilmington Television Corporation, 12 Pike & Fischer RR 187 (1956). The permittee was granted a construction permit to construct a television station at Wilmington, North Carolina on February 17, 1954. Construction should have commenced on April 17, 1954 and been concluded by October 17, 1954. On September 15, 1954, the permittee filed an application for an extension; however, this first application was designated for hearing on issues similar to those enumerated in the preceding case. This was despite the fact that the permittee had reserved part of a building for studio space for the station; had purchased paints, lumber and other materials for remodeling; had purchased a new generator for the building's elevator in anticipation of increased traffic; and had engaged in certain "planning". During hearing, the permittee asserted, as justification for its failure to start construction, that it had not resolved a network affiliation problem and, until the problem was resolved, it was uncertain concerning the exact facilities which would be required. Nevertheless, taking into consideration all of the permittee's efforts, and the justification for its failure to complete construction within the required time, the Commission concluded that an insufficient showing of diligence had been made to justify an extension.

City of Jacksonville, Florida, 5 Pike & Fischer RR 1357 (1949). A first application for an extension of time in which to construct a television facility was designated for hearing to determine whether the permittee had been diligent in proceeding with construction. Despite the fact that the city had incurred expenses of $4,300.00 in modifying its radio tower to support a television antenna; had cleared a site for the

antenna and transmitter house; architect's plans had been drawn for a transmitter building; a list of necessary equipment had been made; an investigation of the availability of such equipment had been made; and tentative arrangements for affiliation with NBC had been made, the Commission concluded that sufficient diligence had not been shown to justify the extension. The application was denied.

Raytheon Manufacturing Company, 5 Pike & Fischer RR 389 (1949). An application for an extension of time was designated for hearing and, following hearing, denied. The Commission held that the failure of negotiations for the purchase of a site did not constitute good cause, nor the deterioration of the permittee's financial condition, nor its failure to complete the manufacture of its own equipment. Finally, the fact that the permittee planned to integrate its station with a microwave relay link to be completed between New York and Boston was held not to constitute good cause, and the application was denied on the ground that all of the causes of delay were within the control of the permittee.

Magic City Broadcasting Corporation (Docket No. 14554) (Hearing Order released February 8, 1963; FCC 63-114). The Commission designated for hearing an application for an extension of time in which to complete construction specifying, among others, issues which required a determination of the good faith of the applicant with regard to prior representations made to secure previous extensions. This action was taken by the Commission because the information of record indicated that the permittee had undertaken negotiations to sell the construction permit prior to the filing of the application for an extension which was the subject of the Hearing Order.

Central Wisconsin Television, Inc. (Docket No. 14933); Memorandum Opinion and Order released January 25, 1963 (FCC 63-62). The Commission, in addition to the standard issues relating to diligence, specified issues requiring a determination as to when, and under what circumstances, the applicant had determined to dispose of its construction

permit, including facts pertaining to negotiations, the time and with whom; whether misrepresentations had been made to the Commission; and whether the permittee had the requisite character qualifications to be a licensee. The Commission's action was based upon a Petition to Deny which alleged that the permittee had not been unable to complete construction due to causes beyond its control. The Petition further asserted, however, that, even should the permittee have been prevented from constructing for reasons beyond its control, that fact was not a relevant consideration since the permittee had abandoned any intent to construct the station as evidenced by the fact that an application had been filed to assign the construction permit.

The foregoing cases, with one or two exceptions, were cited to the Commission by Appellant in its Petition to Deny Applications. The Commission's Memorandum Opinion and Order, however, did not review or analyze — or even attempt to distinguish — those cases in the light of the record before it. Nor were any cases cited by the Commission to the contrary. In fact, aside from reciting the procedural background and history of the various applications involved, the Commission essentially restricted its Memorandum Opinion and Order to an analysis of Intervenor's violation of the provisions of Section 311 (c) of the Communications Act.[10]

The Commission's action was taken despite the fact that every indication of record is that Intervenor has failed to comply with the requirement that construction commence within 60 days of the issuance of the construction permit; despite the fact that the record is devoid of any "proper showing" which would justify an extension of time; and despite the fact that Intervenor has never even attempted to show or demonstrate that construction was not completed because of matters beyond its control or for reasons which would sustain a showing of "good cause". None of those matters were even considered in the

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[10] That matter is subsequently discussed in this Brief.

Commission's Memorandum Opinion and Order. In fact, it was only in the final Ordering clause of the Order that the Commission gave any consideration whatsoever to the application for an extension. In so doing, the Commission merely ordered that the extension should be granted through October 31, 1963 "in view of the commitment to early completion of station construction" (R. 126), which "commitment" was contained in an amendment to Intervenor's application for an extension filed February 20, 1963 (R. 83-85).

It is recognized, of course, that Section 309 (d) (2) of the Communications Act of 1934, as amended, 47 U.S.C. 309 (d) (2) authorizes the Commission to grant an application -- notwithstanding the pendency of a Petition to Deny -- if (but only if) the Commission finds a grant of the application would be consistent with considerations of the public interest, convenience and necessity. By the same token, however, that Section also specifically provides that, if a substantial and material question of fact is presented or if the Commission for any reason is unable to find that a grant of the application would be consistent with the public interest, convenience and necessity, it shall designate the application for hearing in accordance with the provisions of sub-paragraph (e) of that Section (Section 309 (e), 47 U.S.C. 309 (e)).

In either case, the Commission must base its conclusions upon proper findings of fact. There must be "some rationale or coherent relationship between the basic facts and the ultimate facts that the latter shall flow logically from the former. It was not the will of Congress . . . that Orders shall be based upon ultimate facts which bear no rational relationship to the basic facts shown by the evidence." Tri-State Broadcasting Co. v. Federal Communications Commission, 68 U.S. App. D.C. 292, 96 F.2d 564, 567 (1938). "It is elementary that findings of basic facts must be based on substantial evidence in the record as a whole." Harrell v. Federal Communications Commission, 105 U.S. App. D.C. 352, 355, 267 F.2d 629, 632 (1952).

The Commission not only failed to make the necessary findings of fact, but its action in granting the application was not even based upon a "bare conclusion" or assertion that the public interest would be served by its action. Even such a conclusion would not, however, have sustained the Commission's action since the "statutory duty of this Court to review the action of the Commission" is effectively nullified unless the Commission sufficiently states the reasons for its conclusion. Telanserphone, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 352, 267 F.2d 632. The Commission must submit a "concise statement of the reasons for denying" a petition requesting denial of an application, which statement must "furnish an adequate basis for immediate judicial review." See the House Report on Section 309 of the Communications Act (H.R. No. 1800, 86 Cong., 2d Sess., p. 12). That same Report also provides that, while the Commission should dispose of petitions which are of no real consequence:

> "If a substantial and material question of fact is presented or if the Commission for any other reason is unable to find that a grant of the application would be consistent with subsection (a) [of Section 309] it shall proceed as provided in subsection (b) [of Section 309]. The purpose of this language is to make it absolutely clear that the application will be designated for hearing in any case where a substantial and material question of fact is presented and not disposed of."

In summary, it is submitted that the Commission's action in granting the application for an extension was inconsistent with its statutory responsibility under Section 319 (b) of the Communications Act in that it failed to require a proper showing of reasons which would justify the extension, and the Commission's Memorandum Opinion and Order is also inconsistent with the requirements of Section 309 (e) of the Communications Act, 47 U.S.C. 309 (e). The Commission cannot, as it did in this case, ignore or disregard the verified good faith allegations of Appellant; disregard and ignore citations to applicable legal precedent; and then take action without making appropriate factual findings to support such action.

> "The requirement that courts and commissions acting in a quasi-judicial capacity, shall make findings of fact, is a means provided by Congress for guaranteeing that cases shall be decided according to the evidence and the law, rather than arbitrarily or from extralegal considerations; and findings of fact serve the additional purpose, where provisions for review are made, of apprising the parties and the reviewing tribunal of the factual basis of the action of the court or commission, so that the parties and the reviewing tribunal may determine whether the case has been decided upon the evidence and the law, or, on the contrary, upon arbitrary or extralegal considerations. When a decision is accompanied by findings of fact, the reviewing court can decide whether the decision reached by the court or commission follows as a matter of law from the facts stated as its basis, and also whether the facts so stated have any substantial support in the evidence. In the absence of findings of fact the reviewing tribunal can determine neither of these things. The requirement of findings is thus far from a technicality. On the contrary, it is to insure against Star Chamber methods to make certain that justice shall be administered according to facts and law. This is fully as important in respect of commission as it is in respect of courts." Saginaw Broadcasting Co. v. Federal Communications Commission, 68 U.S. App. D.C. 282, 96 F.2d 554 (1938).

II

Appellee's failure to find and conclude that the transfer of 49.5% of the stock of Music Productions required an evidentiary hearing to determine whether control was, in actuality, also concurrently transferred, was arbitrary and capricious.

The fact that Intervenor, after holding the construction permit for over two years, has not engaged in any actual construction not only should have resulted in a denial of the application for an extension, but is indicative — when viewed in relationship to other circumstances —

of Intervenor's actual intention to dispose of the construction permit. In this regard, reference is made to the case of Plains Radio Broadcasting Co., 23 Pike & Fischer RR 21 (Initial Decision released February 7, 1962). That case involved a series of FM construction permits granted on March 16, 1960. Shortly before the construction permits were granted, the General Manager of the permittee corporation resigned his office. It was thereafter determined by the principals of the corporation that it would be unwise to proceed with construction of the stations. The Hearing Examiner determined that there was, in fact, "a lapse of time amounting to a week or two before any definitive action was taken and this consisted of an attempt to recoup the expenses by assigning the permit . . ." The Examiner then pointed out that Section 319 (b) of the Communications Act contemplates a good faith intent by permittees to proceed with construction, and that, even supposing there was some "lingering hope" of going ahead with construction, such conduct falls far short of the diligence expected of a permittee. In denying the requested extensions, the Examiner held not only that diligence had not been shown, but that a grant of the proposed assignment applications would be inconsistent with the Commission's policy against trafficking and, accordingly, denied the applications for consent to the assignment of the construction permits as well.

Certainly Intervenor was aware of this decision, as well as the legal principles involved, at the time it determined to dismiss the assignment application following the filing of Appellant's Petition to Deny Applications. Whether or not this entered into Intervenor's determination to dismiss the application, cannot, of course, be determined on the basis of this record. By the same token, however, a prima facie question of Intervenor's good faith is raised by virtue of the fact that, following dismissal of the assignment application, Intervenor then transferred to a stranger the maximum ownership possible without necessitating the filing of an application for a transfer of control. In so doing, the Agreement entered into (R. 111-120) placed the greater

financial responsibility for the construction of the station upon the new (but "minority") stockholder.

The Commission, in determining that there was no basis to raise questions concerning the possibility of a transfer of control, failed to give full and adequate consideration to all of the relevant factors and surrounding circumstances. In summary, those are: (a) Intervenor had never made any good faith attempt to actually construct the facilities authorized, (b) just shortly before the construction permit was due to be forfeited (following one extension), Intervenor filed an application to assign 100% of the construction permit to a different party, (c) in so doing, Intervenor advised the Commission that other employment responsibilities precluded its principal from devoting the time and attention necessary for building the station and putting it on the air (R. 2), (d) thereafter, Intervenor filed a second application for an extension of time for the sole purpose of permitting the Commission to take action on the assignment application and, in so doing, again advised the Commission that its principal would be unable to proceed with construction and operation, (e) following the filing of a Petition to Deny Applications, Intervenor, by an ex parte action, dismissed the assignment application, and (f) thereafter transferred the maximum amount of stock permissible to a third party. That party, unlike the previous principals of Intervenor, is a resident of the community. That party also assumed the primary financial responsibility for the construction of the station.

The Commission merely concluded (R. 123) that, because Mrs. Rogers has had considerable experience in station management, there was no reason to believe that control would devolve on Mr. Spillman. The conclusion, however, disregards not only the other relevant background circumstances, but the fact that, as part of the transaction, Mrs. Rogers transferred all of her stock to Mr. Rogers. Accordingly, the Commission's conclusion was not only in the face of substantial evidence

to the contrary, but was not based upon an adequate factual foundation. At the least, the Commission should have designated the matter for hearing in order that all of the circumstances surrounding the negotiations and transfer could be fully explored and developed upon the record.

III

Appellee's failure to conclude that Intervenor's violation of the provisions of Section 311 (c) of the Communications Act, and the terms of an Order of the Chief Hearing Examiner, required denial of the application for an extension of construction authority was arbitrary and capricious. At the least, the Commission should have ordered an evidentiary hearing permitting inquiry into those matters, as well as other related applications, transactions and representations, for the purpose of determining whether Intervenor possesses the requisite character qualifications to be a Commission licensee, and whether the public interest would better be served by permitting the filing of other applications for the facilities in order to secure a more qualified licensee.

Intervenor's application was filed with the Commission on December 8, 1959 (File No. BP-13714). The application was mutually exclusive with two other applications proposing the same facilities for Waynesboro and was mutually exclusive with an application proposing the same facilities, but in Luray, Virginia. Finally, the application involved some proposed interference with an application by an existing station to increase power in Danville, Virginia (R. 151). All of the applications were designated for hearing by the Commission on several issues (see R. 151-156). Issue No. 7 required a determination whether Intervenor and James J. Williams (one of the Waynesboro applicants) were financially qualified to construct and operate their respective proposed stations (R. 154). Issue No. 10 required a determination whether the proposal for Danville, Luray or Waynesboro would best provide a fair, efficient and equitable distribution of radio service in accordance with the requirements of Section 307 (b) of the Communications Act. Finally, Issue No. 11

required a determination as to which (in the event it was concluded that one of the Waynesboro applications should be granted) of the three applications for Waynesboro would best serve the public interest according to the comparative qualifications of the applicants involved (R. 155).

Shortly after issuance of the Hearing Order, negotiations commenced which ultimately led to the filing of three joint petitions submitted pursuant to Section 311 (c) of the Communications Act for approval of Agreements looking toward dismissal of both of the other Waynesboro applications and the Luray, Virginia application. As a part of the Agreements, Intervenor proposed partial reimbursement of expenses to one of the Waynesboro applicants and to the Blue Ridge applicant in consideration of the dismissal of those two applications. In the case of the remaining Waynesboro applicant (James J. Williams) a merger was proposed whereby Mr. Williams would acquire 20% of the ownership of Intervenor's application (R. 157). The petitions and agreements contained therein were approved by Memorandum Opinion and Order of the Chief Hearing Examiner released April 3, 1961 (R. 157-159). It is significant to note that, in the Ordering clause of the Memorandum Opinion and Order of the Chief Hearing Examiner, the Examiner specifically ordered "that the application of Music Productions, Incorporated, is amended to show that James J. Williams holds a 20% stock interest therein . . ." (R. 159).

In connection with its Petition to Deny Applications Appellant asserted that the Commission should not permit a procedure which would permit an applicant to "buy out" and "merge" with competitive applicants in order to render moot hearing issues requiring a determination of (a) the respective needs of the communities involved, and (b) a comparative analysis of the various applicants involved to fulfill the needs of the community selected upon the resolution of the first issue — community need. It is submitted that this is particularly

true where the surviving applicant subsequently violates the terms of the merger Agreement, by "buying out" the applicant which merged, for the purpose of transferring the construction permit to a different party – or, as was the ultimate result in this case -- transferring a significant interest to the Editor and Publisher of the local newspaper in the community. It is obvious, of course, that newspaper ownership would have posed a substantial disadvantage had it been involved at the time of the filing of the applications.

The Commission did not answer those contentions, but merely concluded that the transfer of the stock to Mr. Spillman would not result in an undue concentration of control over local communications media. The Commission did not, however, consider whether the action involved violated the policy expressed in Section 1.316 (b)(1) of its rules. That Section provides as follows:

> "Whenever two or more conflicting applications for construction permits for broadcast stations pending before the Commission involve a determination of fair, efficient and equitable distribution of service pursuant to Section 307 (b) of the Communications Act and an agreement is entered into to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to Section 1.312) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section. If upon examination of the proposed agreement the Commission finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several states and communities, then the Commission shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement."

The above cited rule provision was not in effect at the time of the approval of the buy out and merger Agreements under consideration. However, the rule is expressive of a policy of the Commission to insure that (a) the mandate of Section 307 (b) of the Commission's rules is carried out, and (b) that only the best qualified applicants become Commission licensees. Where, as in the present case, an applicant receives a construction permit by bringing about the dismissal of all other competing applications; thereafter violates the terms of a merger Agreement involved in securing such dismissals; then fails to timely construct the facilities authorized; and then attempts to dispose of the construction permit, it would seem apparent that public interest considerations require that the Commission at least consider the question whether other applicants should be permitted to file for the facilities involved.

The Commission's Hearing Order also failed to explore, or make factual findings concerning, the probability that certain misrepresentations were made to it in connection with the various applications involved. It is submitted that the limited record evidence available establishes that such representations were made. For example, it was recited in the above-referenced merger agreement that the merger was being effected "in order to expedite" the proceeding. Moreover, it was recited in a related Affidavit of Mr. Williams that he was satisfied with the arrangements of the Agreement because it would permit him to take an active part in the ownership and management of the proposed station while relieving him of the obligation to finance the entire construction and operating costs. The Affidavit also recited that the rights acquired under the merger constituted the "sole consideration" for the merger.

Despite those representations, there was anything but "expedition" resulting. As already noted, although Intervenor has asserted that it has purchased land and acquired a studio lease, even those assertions raise questions concerning possible misrepresentations in view of the

fact that Intervenor has recently filed an application specifying a different transmitter and studio site. Nor may the representations be reconciled with the statement that the purpose of the assignment application to W. Courtney Evans was necessitated by virtue of other employment responsibilities of Intervenor's principal stockholder. That statement, in itself, disregarded the representation made in connection with the merger agreement that the merger would permit Mr. Williams to take an active part in the ownership and management of the proposed station. In this regard, however, it is interesting to note that, in Intervenor's "Opposition to Petition to Deny Applications" it is recited that "no final disposition was required or was made with respect to Williams until the decision was made to assign the construction permit to Mr. Evans" (R. 77).[11]

Intervenor has never disclosed the reasons why Mr. Williams could or could not, take an active part in the ownership and management of the proposed station. Instead, following dismissal of the assignment application to W. Courtney Evans, and following the transfer of ownership to Mr. Spillman, Intervenor has attempted to explain away the fact that it can now — allegedly — at least supervise the construction and operation of the station — under the auspices of Mrs. Rogers, a non-stockholder.

In any event, aside from the fact that a material deviation from the terms of the merger agreement occurred, the subsequent conduct of Intervenor in reimbursing Mr. Williams the sum of $1500 directly contradicted the above noted Affidavit that the rights acquired by Mr. Williams under the merger constituted the "sole consideration" to Mr. Williams. The Commission itself concluded that this conduct violated the requirements of Section 311 (c) of the Communications Act.

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[11] If Music Productions had, in fact, taken any steps looking toward construction and operation of the facilities authorized between the date of the construction permit and the date of the filing of the assignment application, it would seem apparent that there would have been some discussion with "or disposition of" Mr. Williams in connection with the plans made at that time.

While all of the factors involved, viewed in their entirety, would seem to dictate that the Commission should entertain at least some small concern concerning the manner in which its processes were used — or abused — the Commission did not even require an explanation or answer to any of the significant questions placed in issue. For example, if nothing else, the Commission should have required disclosure of the reasons why the merger with Mr. Williams was subsequently disregarded despite the clear Ordering clause in the Memorandum Opinion and Order of the Chief Hearing Examiner. Whether or not Intervenor should be expected to entertain sufficient sophistication to anticipate the requirements of Section 311 (c) of the Communications Act is beside the point. The most minimal regulatory obligation of the Commission would seem to require that the Commission at least inquire as to "why" the merger was subsequently abandoned and for what reason. Those questions, as well as numerous others raised in other parts of this Brief, were never inquired into by the Commission, much less made the subject of factual findings.

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinion and Order granting Intervenor's application without hearing should be set aside and the Commission directed to hold an evidentiary hearing in connection with the application in order to permit the complete development, and full exploration of, all relevant facts upon the hearing record.

Respectfully submitted,

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APPENDIX

STATUTES

Section 307(b) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b):

> Sec. 307(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

Section 309(d) and (e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d) and (e):

> Sec. 309 (d)(1) Any party in interest may file with the Commission a petition to deny any application (whether as originally filed or as amended) to which subsection (b) of this section applies at any time prior to the day of Commission grant thereof without hearing or the day of formal designation thereof for hearing; except that with respect to any classification of applications, the Commission from time to time by rule may specify a shorter period (no less than thirty days following the issuance of public notice by the Commission of the acceptance for filing of such application or of any substantial amendment thereof), which shorter period shall be reasonably related to the time when the applications would normally be reached for processing. The petitioner shall serve a copy of such petition on the applicant. The petition shall contain specific allegations of fact sufficient to show that the petitioner is a party in interest and that a grant of the application would be prima facie inconsistent with subsection (a). Such allegations of fact shall, except for those of which official notice may be taken, be supported by affidavit of a person or persons with personal knowledge thereof. The applicant shall be given the opportunity to file a reply in which allegations of fact or denials thereof shall similarly be supported by affidavit.

(2) If the Commission finds on the basis of the application, the pleadings filed, or other matters which it may officially notice that there are no substantial and material questions of fact and that a grant of the application would be consistent with subsection (a), it shall make the grant, deny the petition, and issue a concise statement of the reasons for denying the petition, which statement shall dispose of all substantial issues raised by the petition. If a substantial and material question of fact is presented or if the Commission for any reason is unable to find that grant of the application would be consistent with subsection (a), it shall proceed as provided in subsection (e).

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the then obtaining reasons and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding therein by filing a petition for intervention showing the basis for their interest at any time not less than ten days prior to the date of hearing. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

Section 311 (c) of the Communications Act of 1934, as amended, 47 U.S.C. 311 (c):

(c)(1) If there are pending before the Commission two or more applications for a permit for construction of a broadcasting station, only one of which can be granted, it shall be unlawful, without approval of the

Commission, for the applicants or any of them to effectuate an agreement whereby one or more of such applicants withdraws his or their application or applications.

(2) The request for Commission approval in any such case shall be made in writing jointly by all the parties to the agreement. Such request shall contain or be accompanied by full information with respect to the agreement, set forth in such detail, form, and manner as the Commission shall by rule require.

(3) The Commission shall approve the agreement only if it determines that the agreement is consistent with the public interest, convenience, or necessity. If the agreement does not contemplate a merger, but contemplates the making of any direct or indirect payment to any party thereto in consideration of his withdrawal of his application, the Commission may determine the agreement to be consistent with the public interest, convenience, or necessity only if the amount or value of such payment, as determined by the Commission, is not in excess of the aggregate amount determined by the Commission to have been legitimately and prudently expended and to be expended by such applicant in connection with preparing, filing, and advocating the granting of his application.

(4) For the purposes of this subsection, an application shall be deemed to be "pending" before the Commission from the time such application is filed with the Commission until an order of the Commission granting or denying it is no longer subject to rehearing by the Commission or to review by any court.

Section 319 (b) of the Communications Act of 1934, as amended, 47 U.S.C. 319 (b):

Sec. 319 (b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

COMMISSION RULES

§ 1.314 Period of Construction.

Each construction permit will specify a maximum of 60 days from the date of granting thereof as the time within which construction of the station shall begin and a maximum of 6 months thereafter as the time within which construction shall be completed and the station ready for operation, unless otherwise determined by the Commission upon proper showing in any particular case.

§ 1.316 Agreements Between Parties for Amendment or Dismissal of, or Failure to Prosecute Broadcast Applications.

(b)(1) Whenever two or more conflicting applications for construction permits for broadcast stations pending before the Commission involve a determination of fair, efficient and equitable distribution of service pursuant to section 307(b) of the Communications Act, and an agreement is entered into to procure the withdrawal (by amendment to specify a different community or by dismissal pursuant to § 1.312) of the only application or applications seeking the same facilities for one of the communities involved, all parties thereto shall file the joint request and affidavits specified in paragraph (a) of this section. If upon examination of the proposed agreement the Commission finds that withdrawal of one of the applications would unduly impede achievement of a fair, efficient and equitable distribution of radio service among the several States and communities, then the Commission shall order that further opportunity be afforded for other persons to apply for the facilities specified in the application or applications to be withdrawn before acting upon the pending request for approval of the agreement.

§ 1.323 Application for Extension of Construction Permit or for Construction Permit to Replace Expired Construction Permit.

(a) Application for extension of time within which to construct a station shall be filed on FCC Form 701. The application shall be filed at least 30 days prior to the expiration date of the construction permit if the facts supporting such application for extension are known to the applicant in time to permit such filing. In other cases, an

application will be accepted upon a showing satisfactory to the Commission of sufficient reasons for filing within less than 30 days prior to the expiration date. Such applications will be granted upon a specific and detailed showing that the failure to complete was due to causes not under the control of the grantee, or upon a specific and detailed showing of other matters sufficient to justify the extension.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MUSIC PRODUCTIONS, INC.,

Intervenor.

Appeal from a Memorandum Opinion and Order of the
Federal Communications Commission

January 7, 1964.

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INDEX

TABLE OF CASES

United States Court of Appeals

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WAYNESBORO BROADCASTING CORPORATION,

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REPLY BRIEF FOR APPELLANT

I

The Issue Regarding Inadequate Findings[1]

The Briefs of Music Productions, Inc. (Intervenor) and the Federal Communications Commission (Appellee) only serve to delineate and underscore further the failure of the Federal Communications

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[1] Appellant does not propose herein to rehash, review or reargue the numerous questions involved, but to respond only to certain fundamental misconceptions which are set forth in the Briefs of Appellee and Intervenor.

Commission (Commission) to make adequate findings upon which to base the action taken in its Memorandum Opinion and Order which is the subject of this appeal. Indeed, with reference to the question of a proper showing to justify a grant of the application for additional time to construct the facilities authorized, not one single "finding" was made.

Both Appellee and Intervenor attempt to "impute" findings which might form some basis — however inadequate — for the Commission's action from the Commission's recitation of the procedural background and history of the proceeding in its Memorandum Opinion and Order. Such a procedure is, however, patently absurd. There is little dispute regarding the background of the proceeding -- what applications were filed and when. The fundamental fact is that Appellant, in its Petition to Deny Applications (R. 55-70) and its Reply to Opposition to Petition to Deny Applications (R. 91-110), pointed out, among other matters, Intervenor's lack of diligence in constructing, the legal inadequacy of its application for a further extension, and the absence of any data or information which would, according to established cases and procedures, justify an extension. Despite this, the Commission never required any additional information from Intervenor. More significantly, the Commission's Memorandum Opinion and Order totally failed to even acknowledge the existence of Appellant's Petition and Reply as to those matters. None of the allegations made, none of the questions posed, none of the issues raised, and none of the factual deficiencies delineated were reviewed or answered by the Commission.

One of the principal bases of Appellant's position is that the Commission failed to discharge its statutory obligation to make sufficient findings of fact to justify its action in granting the requested extension in the face of the several public interest questions raised by Appellant. Hudson Valley Broadcasting Corporation v. Federal Communications Commission, ___ U.S. App. D.C. ___, 320 F. 2d 723; 25 Pike & Fischer, R.R. 2074; Telanserphone, Inc. v. Federal Communications Commission,

97 U.S. App. D.C. 352, 267 F.2d 632. Rather, the Commission followed the intolerably frustrating procedure of merely reciting essentially the same procedural history as had already been recited by Appellant, followed by a sudden, abrupt and general conclusion—based neither upon discussion, review, nor factual analysis in the text of its Memorandum Opinion and Order (but contained only in the Ordering Clause)—that "in view of the commitment to early completion" the application for an extension should be granted.

Appellee's Brief relating to the above issue completely misstates the position of Appellant. At Page 18 of its Brief, Appellee states that "Appellant's disagreement with the Commission comes to no more than disagreement with its ultimate judgment."[2] Of course, this is not the case. As already pointed out, Appellant's disagreement is with the Commission's failure to make any findings regarding the question of whether or not a proper showing had been made which would support the requested extension. If, however—and this we have no means of knowing—it was the Commission's intention to base its action in granting the extension upon the proposition that the only showing which is to be required in order to secure an extension is another commitment to early completion, then Appellee's statement at Page 18 is correct. Appellant is indeed in disagreement with the Commission's ultimate judgment.

The problem is that the basis of the Commission's action can be ascertained—if at all—only through speculation based upon hypothesis. And this is what Appellee apparently would have us do. As previously noted, both Appellee and Intervenor have necessarily attempted to "impute" findings to the Commission. The following are illustrative examples (Pages 14-15 of Appellee's Brief).

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[2] Appellee cites the case of Massachusetts Communicators, Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 277, 266 F.2d 681, as authority that the Commission has discretionary authority to grant extensions. Of course it does. The Decision points out that the Commission may grant extensions if filed within 30 days of the expiration date—or, if late filed, upon a satisfactory showing justifying the late filing—upon a "specific" and "detailed" showing sufficient to justify the extension.

"While construction of the station should have been completed by October 1, 1962, under the terms of the first extension which had been granted on July 17, 1962, it is apparent that a further extension of time in which to complete construction was warranted to effectuate the proposed assignment of the permit to Evans and to permit him time to get the station on the air (Emphasis supplied).

"While the purchase of a site and lease of space represent only one part of the effort required to construct a broadcast station, they constitute a tangible and significant commitment to construct from which the Commission could reasonably conclude that MPI was proceeding diligently (Emphasis supplied).

"In addition, upon the dismissal of the prior application to assign the permit to Evans, MPI proceeded with plans to place the station on the air even though the principal stockholder, due to his duties with the National Symphony Orchestra, was prevented from devoting full time and attention to the construction and operation of the station (Emphasis supplied).

> "The natural interpretation of these events is that MPI in September, 1962, desired to assign the permit to Evans, but that if Commission approval of the assignment was not obtained, it would attempt to place the station on the air itself and bring a second local service to Waynesboro. This conclusion is bolstered by the fact that MPI did request dismissal of the Evans assignment application when Commission action on the application was not forthcoming and took additional measures to put the station on the air, although M. Robert Rogers' participation in this effort would be limited." (Emphasis supplied)

The fallacy—indeed, irony—of Appellee's position is that these untested recitals of "fact" and "interpretation" starkly reveal the most fundamental deficiency of the Commission's Memorandum Opinion and Order. Neither Appellant nor this Court are required to speculate—as Appellee has done—concerning the basis or bases of the Commission's action. Appellee may feel that it is "apparent" that a further extension was warranted in order to effectuate the proposed assignment of the permit to Evans. The Commission's Order did not, however, so state.

Appellee may "speculate" that the purchase of a site and lease of space constitute "a tangible and significant commitment to construct." The Commission's Order did not so state. Appellee may "speculate" that MPI alone proceeded with construction plans even upon dismissal of the Evans assignment application. The Commission's Order did not so state or speculate. Appellee may "hypothesize" that "the natural interpretation of these events" is that MPI would itself place the station on the air should there be a failure of Commission approval to the assignment to Evans.[3] The Commission's Order did not so speculate. Appellee may speculate that its "conclusion" is "bolstered" by the fact that MPI did request dismissal of the Evans assignment application when Commission action on the application was not forthcoming, but this is to bolster a conclusion attributable to the Commission's Order only if clairvoyancy is an attribute of Appellee.

The Commission's action is neither supported nor supportable, and the first deficiency alone requires reversal. Before it can even be speculated whether the Order is supportable, the Commission must specify the basis of its conclusion. If it does not, the statutory duty of this Court to review the action of the Commission is effectively nullified. Telanserphone, Inc. v. Federal Communications Commission, 97 U.S. App. D.C. 352, 267 F.2d 632. The requirement that the Commission show the basis of its decision is more than mere formality or ritual. It forestalls arbitrariness and enables the Court to determine whether the

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[3] Perhaps the danger of this type of "eleventh hour" speculation is best delineated by the fact that the assumptions and speculation engaged in by Appellee are incorrect, in fact. Although the application requesting Commission consent to the assignment of the construction permit to Evans was dismissed prior to the filing of the agreement to transfer stock to Mr. Spilman, the actual fact is that dismissal of the assignment application was not requested of the Commission until after the agreement between Intervenor and Mr. Spilman was consummated. Indeed, counsel for Appellant was requested to defer the filing of the Petition to Deny Applications because negotiations with Mr. Spilman were in the process which, if consummated, would result in dismissal of the Evans assignment rendering moot that aspect of Appellant's Petition. Appellee's confused speculation on this point only emphasizes the inadequacy of the facts upon which the Commission acted and the inadequacy of the Commission's findings in its Memorandum Opinion and Order.

action under review is soundly grounded. Saginaw Broadcasting Co. v. Federal Communications Commission, 68 U.S. App. D.C. 282, 96 F.2d 554 (1938). General conclusions are inadequate. The Commission must set forth a concise statement of reasons in support of its action. Hudson Valley Broadcasting Corporation v. Federal Communications Commission, ___ U.S. App. D.C. ___, 320 F.2d 723.

For the foregoing reasons, the action of the Commission is void ab initio. It is beyond cure at this stage, and its bases cannot be rewritten in clairvoyant afterthought by Appellee or Intervenor. It is not permissible for an agency to rest an action on reasons subsequently formulated, and then only in the face of challenge. Findings must be made on the administrative—not on the review—level. Securities Exchange Commission v. Chenery Corporation, 318 U.S. 80 (1942) aff'd 332 U.S. 194 (1947).

II

The Commission Should Permit Qualified Applicants To File For The Facilities

Both in its Petition to Deny Applications and in its Brief, Appellant has asserted that the various considerations involved require that the Commission deny the requested extension and permit other qualified applicants to file for the facilities. The numerous public interest considerations which militate in favor of such a procedure need not be reiterated.

Intervenor points out that no "case" authority was cited by Appellant in support of the action urged. By Memorandum Opinion and Order released by the Commission December 16, 1963, In re Application of Radio Americana, Inc., Docket No. 13245 (FCC 63-1133), the Commission took similar action in a similar proceeding. That case involved the filing of mutually exclusive applications for new radio stations in Lebanon, Pennsylvania, Catonsville, and Baltimore, Maryland. Following designation for hearing, two of the applicants merged and, upon

dismissal for partial reimbursement of the other application, only one applicant remained. The Chief Hearing Examiner—as in this case—approved both the merger agreement and the dismissal. The remaining application was thereafter granted, but the grant was later set aside by the Commission.

The Memorandum Opinion and Order released December 16 pointed out that, while the so-called Section 307 (b) issue had disappeared from the proceeding, the issue remained in the sense that every grant must meet the fair, efficient and equitable standards of Section 307 (b) of the Communications Act. The Commission further stated:

> 'It is equally clear that it was not the Commission's policy at that time to ascertain whether agreements of the nature there considered constituted an artificial removal of the demand shown under Section 307 (b) for the frequency in another community. The Commission's policy in this regard has now changed; in fact, the policy was undergoing change during the pendency of the Petition for Reconsideration in this matter, and shortly before the remand of this proceeding for further hearing the policy was set forth explicitly in the promulgation of Section 1.316... of the Commission's Rules."

The Commission then went on to hold that "it would be unwise" to adhere to previous policies which precluded the Commission from determining the 307 (b) issue when agreements between applicants specifying different communities resulted in the withdrawal of one or more of the applications, and that the Commission's statutory responsibility under Section 307 (b) requires that the Commission protect the broadcasting needs of particular communities for which broadcast facilities have been proposed and then withdrawn.

The foregoing clearly establishes the Commission's present policy regarding the dismissal of competing applications for different communities. The background of this case compels similar action. Both Appellee and Intervenor assert, however, that Appellant is precluded from protesting the Commission's original action in granting Intervenor's

application and in granting the first extension of its construction permit. This is not, in itself, disputed. Appellant's concern, however, is with a procedure which would permit an applicant—in this case, the last filed applicant—to merge with, and secure the dismissal of, other applications; to then fail to construct or exercise any diligence in taking steps toward construction; to then attempt to dispose of the construction permit to a transferee whose qualifications are in doubt; and to then, for all practical purposes, dispose of responsibility for the construction and operation of the facilities through the transfer of a "49.5%" interest to a person owning the local newspaper.

In determining the public interest questions involved, the circumstances surrounding the grant of the construction permit and the grant of the first extension of the permit are considerations relevant to a determination of the propriety of a grant of the second requested extension.

Similar to the foregoing argument, Appellee and Intervenor urge that this Court is precluded from considering the fact that, subsequent to the issuance of the Commission's Memorandum Opinion and Order, Intervenor filed an application for modification of its construction permit specifying a different transmitter site and studio location. Again, this is to misconstrue Appellant's position. Appellant does not urge that this Court has jurisdiction as such over the filing of that application; however, this Court may certainly take into consideration the fact that such an application was subsequently filed in weighing the significance which may be attributed to the fact that the only "construction" accomplished by Intervenor was the acquisition of land and of a lease which could be used for the tower and studios—ambiguous acts at best. Acts which have no significance whatsoever since Intervenor now proposes a different tower site and the construction (not a "lease") of a studio building at that new site.

It may even further be noted that, subsequent to the filing of Appellant's Brief herein, Intervenor filed still a further application for modification of its construction permit to request a power of 5 kilowatts daytime, to request nighttime operation, and proposing different directional patterns day and night. For every practical purpose, an entirely new proposal is now before the Commission. Not only are different transmitter and studio locations now proposed, but unlimited hours of operation, different powers, and substantially different coverage patterns. Under the Commission's Rules, the application must go on the Commission's processing line since the changes are so substantial as to require the same processing which is attendant to the filing of an entirely new application. Thus, with the changes in ownership which have already resulted, it is obvious that there is little semblance between the pending proposal and the proposal which was the subject of the Commission's original construction permit. Just as the Commission, in the Radio Americana, Inc. case, held that the proceeding therein should be reopened to permit the filing of applications for communities for which applications had been dismissed, so also should the Commission herein permit applicants which better meet its qualification standards to file for the facilities involved.

Respectfully submitted,

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January 7, 1964.

BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
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Appellee,

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ON APPEAL FROM AN ORDER OF THE FEDERAL
COMMUNICATIONS COMMISSION

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STATEMENT OF QUESTIONS PRESENTED

The questions presented, as agreed to by the parties in a stipulation approved by the Court on October 24, 1963, are set forth in appellant's brief, pp. i-ii.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

*Cases chiefly relied upon are marked with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,
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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b), by Waynesboro Broadcasting Corporation (Waynesboro), the licensee of standard broadcast (AM) station WAYB, Waynesboro, Virginia, from a Memorandum Opinion and Order of the Federal Communications Commission adopted July 24, 1963, and released August 2, 1963 (R. 121-126). This Order (1) granted the application of Music Productions, Inc. (MPI) for additional time within which to construct a new standard broadcast station (WBVA) at Waynesboro, and (2) denied a petition by Waynesboro objecting to the proposed extension of time and to a then-pending (and later withdrawn) application for

assignment of the license of station WBVA. It is believed that a more complete statement of the case than that contained in appellant's brief will be helpful to the Court.

On December 8, 1959, MPI, whose sole stockholders were M. Robert Rogers and his wife Teresa Rogers, filed an application for authority to construct a new standard broadcast station at Waynesboro, Virginia, on the frequency of 970 kc (kilocycles). On December 7, 1960, this application was designated for comparative hearing with three other mutually exclusive applications which also proposed to utilize the frequency of 970 kc. Two of the conflicting applications, filed by John Laurino and James J. Williams, also proposed to establish new stations at Waynesboro, while the third application, filed by Blue Ridge Broadcasters, was for a new station at Luray, Virginia (R. 151-156). An existing station at Danville, Virginia (WDTI), which operates on 970 kc, and which proposed to increase its power, was also a party to the hearing.

Agreements were subsequently reached among the competing parties providing for the dismissal of the applications of John Laurino and Blue Ridge Broadcasters, these applicants being given partial reimbursement of their expenses by MPI, and for dismissal of the James Williams application upon the basis of an option given to James Williams to acquire a 20% stock interest in MPI. (R.157-159.) On April 3, 1961, the Commission's Chief Hearing Examiner, acting under a delegation of authority by the Commission, approved the agreements and the amendment of the application of MPI to show

James Williams' interest. He dismissed the application of James Williams, John Laurino, and Blue Ridge Broadcasters. (R. 157-159.)

In an Initial Decision released April 21, 1961, the hearing examiner before whom the matter was pending for hearing found that the proposed operation by MPI would bring a second local standard broadcast service to Waynesboro (with a 1960 population of 15,694) and a new service to 69,479 people, (R. 164) and therefore would serve the public interest. He thereupon granted the application. (R. 167.) He also granted the application of WDTI to increase power, finding no substantial interference between WDTI's proposal and that of MPI. (R. 167.) The Initial Decision became final on June 12, 1961. (R. 160-167.)

The construction permit issued to MPI required that construction be completed by February 12, 1962. (R. 122.) On February 6, 1962, MPI applied for an extension of time to August 1, 1962, to complete construction, stating that an unsuccessful effort had been made to put the station on the air "in time for the fall upswing in business," and that as a result it was decided to postpone construction until the spring. (R. 122.) On March 1, 1962, the Commission wrote to MPI, asking for further explanation of the delay. Upon receiving a clear commitment that construction would proceed diligently, the Commission, on July 17, 1962, granted an extension of time to October 1, 1962 to complete construction. (R. 122.)

On September 10, 1962, MPI applied for consent to assign its construction permit to W. Courtney Evans. (R. 1-40.) MPI

stated that its principal stockholder, M. Robert Rogers, had accepted employment as manager of the National Symphony Orchestra and would therefore be unable to devote the proper time and attention to building the station and putting it on the air. (R. 2.) The agreement for assignment of the construction permit provided that either party could terminate the agreement in the event Commission approval was not obtained within four months. (R. 22-23.)

An application for a second extension of time to complete construction was filed on September 25, 1962, in which MPI stated that the transmitter site had been purchased and studio space had been leased, that the assignment to Evans would be consummated immediately upon receipt of Commission approval, and that the proposed assignee would require a period of six months to construct and place the station in operation. (R. 43-45.) By letter dated October 16, 1962, the Commission advised MPI that it would take no action on the extension application pending disposition of the assignment application. (R. 54.)

A Petition to Deny Applications was filed by Waynesboro on January 25, 1963, directed against the extension application and the still pending application to assign the permit to Evans (R. 55-70.) Waynesboro charged that MPI had not proceeded with diligence in the construction of the station, that it appeared from the information submitted with the assignment application that MPI had made inconsistent statements to the Commission concerning the option to James Williams to purchase 20% of MPI stock, and that there were

serious questions concerning the character of Evans, the proposed assignee.

On February 4, 1963, MPI requested that the assignment application be dismissed, having elected to terminate the agreement when Commission review of the application had not been completed within the specified four month period. (R. 71.) The request to dismiss the assignment application was granted on February 27, 1963. (R. 88.)

On February 20, 1963, MPI filed an amendment to its application for an extension of time to construct to show that an agreement was being completed whereby Louis Spilman, editor and publisher of the Waynesboro News-Virginian, would acquire a 49.5% stock interest in the applicant corporation. (R. 83-85.) This was to be accomplished by (1) the transfer of 40 authorized and issued shares of MPI stock from Teresa S. Rogers to her husband, M. Robert Rogers, thereby increasing his holdings to 100 shares of MPI, and (2) the issuance of 98 shares of authorized MPI stock to Spilman. Payment for Spilman's stock was not to exceed the proportionate share of the expenses incurred by MPI in the preparation and prosecution of its application.

In addition, Spilman agreed to lend the corporation $16,666 on 10 year, 6% notes and Rogers agreed to lend $8,333 to MPI on the same terms. The amendment also stated that settlement of the agreement would take place within 10 days after Commission approval of the extension application and that "contruction of the station will be completed immediately thereafter with a view to getting the station on the air." (R. 85.) The agreement was executed on March 29,

1963, and a copy was submitted to the Commission on April 3, 1963. (R. 111-120.) The agreement also provided that if the Commission did not act on the pending extension application within 90 days, any of the parties might terminate the agreement. (R. 116-117.)

On February 20, 1963, MPI also filed an opposition to Waynesboro's Petition To Deny Applications. (R. 74-82.) MPI stated that although M. Robert Rogers could not devote substantial time and effort to placing the station on the air, Mrs. Rogers, who had 8 years experience as assistant manager and manager of standard broadcast station WGMS, Washington, D. C., would place the station on the air. It was also stated that Spilman, a local resident of Waynesboro, had been brought into the corporation, and that the corporation was committed to early completion of construction. MPI also acknowledged that James Williams had been paid $1500 for the 20% stock option in MPI which he had been given in exchange for dismissal of his application.[1/] MPI also stated that so much of Waynesboro's petition as was directed to the assignment to Evans was rendered moot by the dismissal of that assignment application.

On March 5, 1963, Waynesboro filed a Reply To Opposition To Petition To Deny Applications. (R. 91-110.) Waynesboro re-

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1/ This information was first explicitly contained in the Opposition to Petition to Deny Applications filed by MPI on February 20, 1963. The exhibits submitted by MPI with its application to assign the construction permit to Evans on September 10, 1962, disclosed, however, that MPI was obliged to pay Williams $1,500. (R. 25.)

iterated its charge that MPI had not proceeded diligently with construction and also attacked the payment to Williams as contravening the Commission's rules. Waynesboro also alleged that the transfer to Spilman of a stock interest in MPI would effect a transfer of control of the corporation to him without compliance with the normal transfer procedures, and that such a transfer of control would not be in the public interest because of Spilman's interest in a newspaper in Waynesboro.

On July 24, 1963, the Commission adopted the Memorandum Opinion and Order under review herein, in which it granted the application for extension of time to construct. (R. 121-126.) The Commission pointed out that standing to file a petition to deny is governed by the provisions of Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. 309, and that applications for extension of time to construct authorized facilities are not subject to challenge as a matter of right by a petition to deny under that section. Nevertheless, in view of the public interest questions presented, the Commission considered the merits of the issues raised by Waynesboro.

The Commission concluded on the facts before it that no lack of diligence had been shown (R. 123) and, in view of MPI's early commitment to completion of station construction (R. 126), it granted MPI's application for additional time to construct the station to October 31, 1963. The Commission further held that the agreement with Spilman was not a subterfuge to evade the requirement of

prior Commission approval for a transfer of control, and that no real transfer issue was presented.[2/] The Commission found that in view of the retention by Mr. Rogers of the majority stock interest, and the fact that his wife had considerable experience in station management, there was no reason to believe that control of the facility was in fact being transferred to Spilman. The Commission further found that "in view of the presence of a competing station in the same community, we find little merit in petitioner's contention that Spilman's position as a Waynesboro newspaper publisher will result in an undue concentration of control over local communications media." (R. 123.)

Finally, the Commission held that under Section 311(c) of the Act, 47 U.S.C. 311(c),[3/] approval of the Commission should have been obtained for the payment of $1,500 to Williams for release of his option to purchase a 20% stock interest in MPI before payment was made. However, since the Commission had not previously had occasion to articulate its views concerning the application of the statute in this type of situation, where a merger agreement was later

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2/ Since the application for consent to the assignment of the permit to Evans was withdrawn, no decision on that application was required; since control was not being transferred to Spilman, Commission consent to his stock acquisition was not necessary. See Section 310(b) of the Act, 47 U.S.C. 310(b).

3/ Section 311(c) requires Commission approval of agreements for the withdrawal of an applicant where two or more mutually exclusive applications are pending. It provides that if the agreement contemplates the payment of money in consideration of a withdrawal, rather than a merger, the payment may not exceed the "amount determined by the Commission to have been legitimately and prudently expended and to be expended by [the applicant who is to withdraw] in connection with preparing, filing, and advocating the granting of his application."

followed by a payment in lieu of the ownership arrangement, and the $1,500 represented reimbursement for expenses actually incurred in the prosecution of Williams' application and payment for engineering services rendered by Williams to MPI, no administrative sanctions were deemed warranted. The Commission thereupon denied Waynesboro's Petition To Deny Applications. (R. 124-126.)[4/]

4/ On August 2, 1963, MPI filed an application for a minor modification of the construction permit to specify a different antenna location. (R. 128-148.)

SUMMARY OF ARGUMENT

I.

The Commission acted well within its discretion under Section 319(b) of the Communications Act, 47 U.S.C. 319(b) in granting MPI's application for an extension of time in which to construct. Although this was MPI's second request for an extension of time, the Commission was satisfied that the permit should not be forfeited where MPI had purchased land for a transmitter site and leased studio space, and where it had pending an application for a transfer of the permit to another party. When the transfer was not acted on by the termination date in the contract, MPI took additional steps to place the station on the air, although its principal stockholder could not devote full time towards construction and operation of the station.

The filing of the assignment application prior to the filing of the extension application did not indicate an intention to abandon the permit. Section 310(b) of the Communications Act, 47 U.S.C. 310(b), specifically provides for the transfer of construction permits, and it is reasonable for the Commission to permit permittees additional time to construct authorized facilities while it examines and rules on the transfer.

II.

Appellant's charge that control over the proposed station had passed to Louis Spilman by virtue of his purchase of 49.5% of the stock of MPI has no foundation in law or fact. Legal control of MPI remains with M. Robert Rogers, the majority shareholder, and there is no reason

to believe that actual control will devolve on Spilman, since Rogers' wife will assume responsibility for construction and operation of the station.

The Commission also fully reviewed the circumstances surrounding the payment of $1500 by MPI to James Williams in lieu of the exercise by him of an option to acquire 20% of the stock of MPI. The $1300 payment to Williams represented legitimate expenses incurred by him in conjunction with prosecution of his dismissed application for Waynesboro and a fee for engineering work done by Williams for MPI. Although the payment to Williams should have been submitted for prior approval to the Commission, the Commission found, based on the undisputed facts, that no public detriment would flow from approval of the payment to Williams. Waynesboro has made no substantial challenge to this determination.

Nor has Waynesboro shown an abuse of discretion because of the Commission's failure to impose sanctions against MPI for not submitting the modified agreement for prior approval. The Commission reasonably concluded that since this was the first instance where in these circumstances it was called upon to interpret Section 311(c) of the Communications Act, 47 U.S.C. 311(c), it would not be fair to proceed further against MPI.

The Commission fully considered all facts relevant to the grant of an extension of time. Collateral review of the first extension of time, the merger agreement, and the original grant of the construction permit to MPI is not open to Waynesboro, Herman E. Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 312 F.2d 352, nor

was there any hint of misrepresentation or bad faith on the part of MPI which would warrant Commission review of these earlier actions in order to determine whether the extension application should be granted.

ARGUMENT

I.

THE COMMISSION PROPERLY EXERCISED ITS DISCRETION UNDER SECTION 319 OF THE COMMUNICATIONS ACT IN DETERMINING TO GRANT MPI'S APPLICATION FOR AN EXTENSION OF TIME IN WHICH TO COMPLETE CONSTRUCTION

Section 319(b) of the Communications Act of 1934, as amended, 47 U.S.C. 319(b), provides the relevant standard under which the Commission acts on applications for extension of time in which to construct authorized facilities. The section provides with respect to construction permits, which are the first step in the licensing process, that:

> Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

The section thus provides that forfeiture shall not take place if construction is "prevented by causes not under the control of the grantee." See Richmond Development Corp. v. Federal Radio Commission, 59 U.S. App. D.C. 113, 35 F.2d 883. And it also provides for automatic forfeiture of construction permits only where the station is not ready for operation within the time specified in the original permit "or within such further time as the Commission may allow." This Court has held that even if the causes for delay of the construction are within the control of the grantee, "the Commission is given the power to exercise its discretion and allow further time for construction. An automatic forfeiture of the permit then occurs only

'if the station is not ready for operation . . . within such further time as the Commission may allow.'" Mass Communicators, Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 277, 279, 266 F.2d 681, 683, cert. denied 361 U.S. 828. It has been settled therefore, that a decision to grant or deny an application for extension of time to construct rests within the discretion of the Commission. Appellant has not shown an abuse of that discretion here.

MPI's second application for an extension of time, which is the subject of this appeal, was filed on September 25, 1962. (R. 43-45.) At that time MPI had pending before the Commission an application to assign the construction permit to W. Courtney Evans. (R. 1-40.) While construction of the station should have been completed by October 1, 1962, under the terms of the first extension which had been granted on July 17, 1962, it is apparent that a further extension of time in which to complete construction was warranted to effectuate the proposed assignment of the permit to Evans and to permit him time to get the station on the air. MPI gave this reason in its application of September 25, 1962, and also stated that it had purchased a transmitter site and had leased studio space. (R. 44-45.)[5/] While the purchase of a site and lease of space represent only one part of the effort required to construct a broadcast station, they constitute a tangible and significant commitment to construct from which the Commission could reasonably conclude that MPI was proceeding diligently.

5/ Commission records indicate that these steps had been taken in the Spring of 1962.

In addition, upon the dismissal of the prior application to assign the permit to Evans, MPI proceeded with plans to place the station on the air even though the principal stockholder, due to his duties with the National Symphony Orchestra, was prevented from devoting full time and attention to the construction and operation of the station. Thus, Mrs. Rogers assumed responsibility for construction of the station and Spilman, a local Waynesboro resident, was brought into the corporation. (R. 79-80.) Additionally, further cash money was raised to get the station on the air. (R. 83-85.)

The natural interpretation of these events is that MPI in September, 1962, desired to assign the permit to Evans, but that if Commission approval of the assignment was not obtained, it would attempt to place the station on the air itself and bring a second local service to Waynesboro. This conclusion is bolstered by the fact that MPI did request dismissal of the Evans assignment application when Commission action on the application was not forthcoming and took additional measures to put the station on the air, although M. Robert Rogers' participation in this effort would be limited. While appellant urged to the Commission that there had been a lack of diligence in constructing the station, the basic facts were not in dispute, and there was no substantial question requiring resolution in a hearing. Given a further commitment for the completion of construction (R. 80), the Commission was correct in concluding that MPI had not abandoned its intention to construct and operate the station.

Appellant argues (Br. 6, 13) that the mere filing of the application to assign the construction permit to Evans, followed by the filing of the second extension application, disclosed an intention to abandon the permit as a matter of law. However, it has cited no authority to support this principle, and it is not supportable on any other basis. The Communications Act provides in Section 310(b), 47 U.S.C. 310(b), that construction permits may be transferred upon application to the Commission. Waynesboro's contention that the filing of a transfer application constitutes an abandonment of the permit requiring denial of an application for extension of time to construct would go far toward negating the legitimacy of any transfer of a construction permit.

The Commission's treatement of this matter recognizes the propriety of transfers, and reasonably permits additional time to construct while the Commission examines and rules on the proposed transfer. So long as the assignor receives no more than his legitimate expenses, so that there is no "trafficking" in the permit, Valley Telecasting Co., 12 Pike & Fischer, R.R. 301, 304-305, and no other facts indicate impropriety, it is perfectly proper to refuse to treat a proposed transfer as an abandonment. And, it is equally within the legitimate range of agency discretion not to require the proposed assignor to proceed to expend further funds and complete construction while the transfer is pending before the Commission. That is all Waynesboro complains of here.

Waynesboro relies upon several Commission decisions (Br. 15-19) as indicating that an extension of time to construct could not be justified here. However, with one exception, these cases did not involve the question presented here of whether the Commission may consistently with the statute permit a permittee to await Commission action on a pending application to transfer the permit.[6/] The single case (Central Wisconsin Television, Inc., 24 Pike & Fischer, R. R. 912) that was designated for hearing where both an extension application and an assignment application were pending is clearly distinguishable, for the objecting party there had alleged that the permittee had formed an intent to dispose of the permit prior to actually receiving it. A "trafficking" question was thus presented. No such allegations are present here.

In any event, since the Commission is not bound by the rule of stare decisis, Federal Communications Commission v. WOKO, Inc., 329 U.S. 223, 228; Kentucky Broadcasting Co. v. Federal Communications Commission, 84 U. S. App. D.C. 383, 174 F.2d 38, the question is properly whether what was done here was reasonable. See Rhode Island Television Corp. v. Federal Communications Commission, __ U.S. App. D.C.__, 320 F.2d 762.

Waynesboro's further challenges (Br. 10-15) to the Commission's action granting the second extension application are largely based

6/ There was an additional period of time here after the transfer application was withdrawn on February 4, 1963, while the Commission considered the pleadings before it. During this time, MPI brought in Spilman as a stockholder.

upon the alleged invalidity of the grant of the first extension application, and the fact that MPI applied to the Commission on August 2, 1963, to modify its facilities to move its antenna site approximately 2 miles, after the adoption of the decision here in issue (R. 128-148). But neither of these matters are properly raised here. Since the modification application filed on August 2, 1963, was not before the Commission when it acted on the second extension application, and was not the subject of a petition for reconsideration, it is clearly not relevant to this appeal. Communications Act, Section 405, 47 U.S.C. 405. Nor, of course, can Waynesboro now urge that the first extension was improper, since it did not seek judicial review. Herman E. Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 116, 312 F.2d 352, 356. In any event, taking the entire course of the matter as a whole, appellant has failed to show a lack of good faith or diligence requiring denial of a second extension.

Appellant does not dispute the scope of the Commission's discretion in formulating substantive standards for action on requests to extend construction permits. Its contention that the Commission failed to make adequate findings sufficient to support its determination that a fatal lack of diligence should not be imputed to MPI, flies in the face of the Commission's Memorandum Opinion and Order. The opinion recites the relevant and uncontroverted facts and contains sufficient findings to support the Commission's conclusion. See Hudson Valley Broadcasting Corporation v. Federal Communications Commission, __ U.S. App. D.C.__, 320 F.2d 723. Appellant's disagreement with the Commission comes to no more than disagreement with its ultimate judgment.

But mere disagreement with the Commission's judgment is not sufficient to show an abuse of discretion. On the facts of this case, the Commission was warranted in finding that MPI should not be denied an extension for lack of diligence. Nor,as we shall show in part II herein, did the Commission err in its treatment of the other matters raised by the appellant.

II.

THE COMMISSION PROPERLY SANCTIONED THE PAYMENT TO JAMES WILLIAMS AND THE TRANSFER OF A STOCK INTEREST IN MPI TO LOUIS SPILMAN.

Appellant charges (Br. 22-30) that the Commission committed error with respect to two other matters. It urges first (Br. 22-25) that the transfer of 49.5% of the stock of MPI to Louis Spilman, editor and publisher of a Waynesboro newspaper, required an evidentiary hearing to determine whether actual control of MPI had been obtained by Spilman. Secondly, it asserts (Br. 25-30) that the payment by MPI of $1500 to James Williams for release of Williams' option to purchase a 20% stock interest in MPI violated the Communications Act and the Commission's rules and therefore required denial of MPI's application for an extension of time in which to construct WBVA. Both of these matters were thoroughly considered by the Commission and were properly disposed of.[7/]

Appellant's contentions with respect to the transfer of 49.5% of MPI's stock to Louis Spilman are without merit. Legal control did not pass to Spilman since he has less than a majority of the stock, and there is no reason to believe that he has actually assumed control in view of the fact that the wife of the majority

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7/ Although the Commission fully considered the charges with respect to Williams and Spilman at the time that it passed on the extension application, it could have properly deferred consideration of these matters to such time as MPI files an application for a license to cover the construction permit pursuant to Section 319(c) of the Communications Act, 47 U.S.C. 319(c). Mass Communicators, Inc. v. Federal Communications Commission, 105 U.S. App. D.C. 277, 266 F.2d 681, cert. denied 361 U.S. 828.

stockholder is supervising construction and operation of the station. The fact that Spilman is publisher of the Waynesboro newspaper was also considered by the Commission. It properly concluded that there would be no "undue concentration of control over local communications media," since there were competing media in the area, including appellant's fulltime standard broadcast station, (R. 123). Waynesboro has cited no precedent for the suggestion that the acquisition by a newspaper of a minority stock interest in this situation is a disqualifying event.

Finally, appellant has no basis for its assertion (Br. 7, 22-25) that only 49.5% of the stock was transferred to Spilman in order to evade Commission scrutiny of the transaction which would be required for approval under Section 310(b) of the Act, 47 U.S.C. 310(b), of a transfer of control application. MPI fully informed the Commission of the transaction with Spilman (R. 74-85), and although no transfer application was required to be filed, MPI acknowledged that the Commission had jurisdiction over the transfer of stock to Spilman "by virtue of the application for extension of time." (R. 80). And, as we have shown, the Commission fully considered all the ramifications of the transfer to Spilman before granting the application for an extension of time in which to construct.

In addition, the Commission recognized that the payment of $1500 to Williams in lieu of a 20% stock interest constituted a "material deviation" (R. 124) from the terms of the merger agreement between MPI and Williams which had been approved by the Chief Hearing

Examiner. However, although the payment to Williams had not been approved by the Commission, the Commission found nothing in it which violated the standards normally applied in the situation where an applicant is reimbursed for his expenses in exchange for dismissal of his application. (R. 125.) Appellant has not challenged this finding in any particular, and the finding is supported by the circumstances.

The Commission, concerned with any possible abuse of its processes, closely examined the situation (R.124-126). It found that the $1500 payment to Williams actually was reimbursement to Williams for $675 of out of pocket expenses in prosecuting his dismissed application, and for $850 worth of engineering work done by Williams for MPI. The Commission found the out of pocket expenses were legitimately and prudently expended, and that the engineering fee was reasonable. See The Enterprise Co. v. Federal Communications Commission, 111 U.S. App. D.C. 178, 295 F.2d 165. Waynesboro makes no challenge to these findings.

With respect to the fact that MPI had not submitted the agreement to the Commission for prior approval, the Commission said (R. 126):

> Although it is clear that MPI should have filed the revised agreement for Commission approval prior to buying out Williams' option, its failure to do so must be viewed in the context in which it occurred. This is the first occasion we have had to articulate our view that prior Commission approval is a sine qua non in situations such as this. Because the Act and Rules do not specifically deal with this matter, we recognize that a permittee could be in genuine doubt

about this requirement. Under these circumstances, fairness dictates that we not act against MPI for failure to anticipate our interpretation of Section 311(c) of the Act. Moreover, MPI's previously pending assignment application listed an outstanding obligation in the amount of $1500 in Williams' favor. Thus, while we were advised of MPI's intentions, it was not until the instant pleadings were filed that MPI indicated that the "buy-out" had been consummated. Nonetheless, there is no evidence to suggest that MPI sought to deceive the Commission. 10/ As we have indicated, the fault lay with MPI's failure to obtain prior Commission approval and not with the agreement itself. Under the circumstances of this case, we conclude that no useful purpose would be served by designating the instant application for hearing or by imposing administrative sanctions against MPI.

10/ Although MPI did not timely file ownership data to reflect the "buy-out", its earlier disclosure to the Commission rules out any question of bad faith.

Thus, the Commission fully considered the matter and reasonably concluded that the relinquishment by Williams of his stock option did not require a denial of MPI's request to continue to build its station.

The Commission thus fully considered the factors which were relevant to its decision to grant an extension of time. Waynesboro attempts throughout Point III of its brief to go behind the Commission's original approval of the merger in 1961 and to question the original grant of a construction permit to MPI (Br. 25-27, 28). Thus, Waynesboro urges (Br. 26-28) that the Commission, with applications before it for different communities, should have applied the policy of a later-enacted rule (Section 1.316(b)(1), 26 F.R. 7130, now Section 1.525) which provides an opportunity for new applications where withdrawal of an application would impede achievement of an

equitable allocation of facilities, i.e., would destroy the opportunity to choose between applicants for different communities and thus prevent comparison of community needs. Waynesboro also suggests that the later issuance of stock to Spilman destroys the foundation of the original grant to MPI (Br. 27).

However, the dismissal of the competing applications and the grant to MPI were never challenged by Waynesboro or any other party, and are thus now final and not collaterally reviewable.[8/] Herman E. Sayger v. Federal Communications Commission, 114 U.S. App. D.C. 112, 312 F.2d 352; Tomah-Mauston Broadcasting Co. v. Federal Communications Commission, 113 U.S. App. D.C. 204, 306, F.2d 811.

Insofar as the Commission may be said to have lost an opportunity to permit new applications for the community of Luray at the time it approved the merger, no collateral attack will lie,[9/] and, indeed, none of the later developments relied upon by Waynesboro even tend to indicate that the earlier decision was incorrect in this respect.

Nor does the subsequent issuance of stock to Spilman invalidate the earlier merger and grant of a construction permit. As we have pointed out, the fact that Spilman has a minority interest does not disqualify the permittee. And, in the absence of some indication that it was intended all along to bring him in, his participation

8/ MPI's application was granted only after a hearing satisfactorily resolved such matters as the interference caused to an existing station and the question of MPI's financial qualifications (R. 160-167).
9/ It should be noted that in its present decision the Commission adverted to this question and pointed out that Waynesboro and Luray have the same number of local stations and that Waynesboro is substantially larger (R. 123).

does not have any retroactive effect.

Thus, there is no room for any contention that the entire course of events indicates the sort of bad faith which might warrant reopening old questions in order to deal adequately with the question of the second extension of time requested by MPI. There is in this case no thread of misrepresentation or concealment, but merely the bare question of whether MPI has forfeited its position as a permittee by not completing construction in the light of its proposal to transfer the permit and its other attempts to work out the problems caused by M. Robert.Rogers becoming manager of the National Symphony Orchestra. To suggest abuse of process, as does Waynesboro (Br. 30), is not to demonstrate a serious probability of its existence. In the absence of that probability, the Commission properly granted the extension application before it.

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinion and Order should be affirmed.

Respectfully submitted,

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Federal Communications Commission
Washington, D. C. 20554

December 16, 1963

BRIEF FOR INTERVENOR

UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 18,094

WAYNESBORO BROADCASTING CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MUSIC PRODUCTIONS, INC.,

Intervenor.

Appeal from a Memorandum Opinion and Order
of the Federal Communications Commission

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December 16, 1963

STATEMENT OF QUESTIONS PRESENTED

Appellant has properly stated the Questions Presented as agreed to by the parties.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES COURT OF APPEALS
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BRIEF FOR INTERVENOR

STATEMENT OF THE CASE

In view of the Statement of the Case by Appellant and the Counter-statement of the Case by the Appellee, Intervenor will not re-state the facts of the case.

SUMMARY OF ARGUMENT

I.

Under Sec. 319(b) of the Communications Act, as construed by this Court in Mass Communicators, Inc. v. FCC, the Commission has a broad discretion in matters involving applications for extension of time to construct previously authorized facilities; and that discretion was properly exercised in this case. Appellant's claim that Intervenor's abortive attempt to assign its construction permit to Evans was an "abandonment" that required that the construction permit be forfeited is wholly at odds with established Commission policies and procedures under which extensions of time are routinely granted in connection with the assignment of construction permits to afford the assignee of the facility sufficient time to construct it.

II.

In its Memorandum Opinion and Order herein the Commission concluded that no lack of diligence should be ascribed to Intervenor; and that conclusion was based on findings of fact which, for the most part, parallel the facts as set out by Appellant in the Statement of the Case contained in its Brief. The Commission, therefore, fully complied with all requirements that it set forth the reasons for its action and the facts on which they are based. Moreover, in view of the close parallel between the facts as found by the Commission and as stated by Appellant, there can be no question of any "substantial or material question of fact" under Sec. 309(e) of the Communications Act, if that section is applicable to the instant case.

III.

The Commission properly disposed of the other contentions made in Appellant's "Petition to Deny Applications". No subterfuge was involved in the sale of stock to Spilman. The Commission was given an opportunity to pass on the sale before it was consummated and properly held that no transfer of control was involved nor did Spilman's ownership in the Waynesboro newspaper raise a question requiring a hearing.

As far as the payment to Williams is concerned, although the money was paid him without prior Commission approval, the action was taken in good faith and the Commission subsequently approved the payment nunc pro tunc after applying the same tests it would have applied if approval had been sought in advance. The other innuendos which Appellant seeks to raise in connection with the Williams matter are shown by the record to be without merit.

Appellant's proposal that the Commission should have ordered a new comparative hearing for Intervenor's facility is fallacious and without precedent. Absent any legal invalidity in the proceeding through which it was obtained, Intervenor's construction permit is not subject to collateral attack. Moreover, even if the Commission were to consider at this point the relative needs of Waynesboro and Luray it would, in any event, prefer Waynesboro over Luray because of the former's far greater population, so that such a re-examination would be a useless thing.

ARGUMENT

I.

THE COMMISSION'S ACTION IN THIS CASE WAS WITHIN THE SCOPE OF ITS RECOGNIZED DISCRETION AND CONSISTENT WITH PRIOR ACTIONS TAKEN UNDER THE CONTROLLING RULES.

In its fairly recent opinion in Mass Communicators, Inc. v. FCC (1959), 105 U.S. App. D.C. 277; 266 F.2d 68, this Court considered in some detail the statutory provision (Sec. 319(b)) of the Communications Act) which controls the Commission's disposition of applications for extension of time to construct previously authorized facilities.

In that opinion the Court noted that, in considering such applications, the Commission had "two important avenues" available, either of which could properly lead to a grant of the application. The first of these avenues is, of course, to determine that the failure to construct within the allotted time resulted from causes not under the control of the grantee. However, the Court noted, even "If ... the causes for delay of the construction are within the control of the grantee, the Commission is given the power to exercise its discretion and allow further time for construction" (Ibid. 105 U.S. App. D.C. at 279)(emphasis supplied).

On this phase of the case, therefore, the only question is whether the Commission has abused the discretion which the statute confided to it.

In the Memorandum Opinion and Order here appealed from, the Commission recited the facts of the case in much the same manner as they are set out in the "Statement of the Case" contained in Appellant's Brief and held that, on the basis of those facts, no "lack of diligence [could be imputed] to MPI" (paragraph 7, R 123). In attempting to establish

that this determination constituted an abuse of discretion on the part of the Commission, Appellant argues that intervenor's prior attempt to sell its construction permit represented, in effect, an abandonment thereof which required the Commission to cancel the authorization, cites a number of prior Commission actions where applicants were found not to have been diligent, and also challenges certain allegations or, at least the significance thereof, which intervenor had made to the Commission relating to its acquisition of a transmitter site and studio space.

A review of the Commission actions in granting and denying (or designating for hearing) extension applications--including those actions cited by Appellant at pages 15 through 18 of its Brief--shows that the Commission routinely grants such applications except where it finds that the applicant has displayed a lack of diligence or where it finds (or suspects) that the applicant may be using (or have used) the period of time that is intended for construction for unrevealed attempts to dispose of its construction permit. In these latter cases, the question posed is not one of diligence but, rather, of misrepresenting to or withholding from the Commission relevant information; and this raises an entirely different issue which concerns the character qualifications of of the applicant, not the diligence of its past actions. Such a case, which has no applicability at all to the instant proceeding, is Central Wisconsin Television, Inc. (cited by Appellant at page 18 of its Brief) where the Commission ordered an investigation into the possibility of earlier, unreported attempts of the permittee to dispose of its authorization, -- not because such attempts would require an automatic forfeiture but, rather, in order to determine whether the applicant had

misrepresented or withheld information from the Commission so that questions were raised concerning its character qualifications. Appellant's discussion of the Magic City case, also cited on page 18 of its Brief, indicates that similar questions were involved in that case as well.

Similarly, the Plains Radio case, cited at page 23 of Appellant's Brief, is wholly inapplicable to this situation. In that case, the applicant had filed a number of applications for FM stations in different cities and had determined, even before the original construction permits were granted, that it would not build the facilities. (See 22 Pike & Fischer RR 221, 223) Under these circumstances, it was a clear violation of the applicant's responsibility to the Commission for it to withhold this information from the Commission and, instead, to accept the construction permits for the sole purpose of trying to dispose of them to recoup its expenses. The Examiner's action in that case, which was obviously correct, has nothing to do with the case at hand.

The other cases cited by Appellant at pages 15 through 18 of its Brief are merely cases where the Commission determined that, for lack of diligence or absence of good cause, an extension should not be granted. These actions, however, are merely isolated examples of the Commission's exercise of its discretion under Sec. 319(b); and by no means circumscribe or define the limits of that discretion.

The contention, expressed in Appellant's pleadings before the Commission and in its Brief in this Court, that Intervenor had "abandoned" its construction permit when it proposed to assign it to Evans and had

thereby forfeited any right to obtain a further extension of time, is wholly contrary to all Commission precedent. It is common practice before the Commission for permittees who desire to dispose of a construction permit to request an extension of time for the sole purpose of affording their proposed assignees time to construct the facilities authorized by the construction permit being assigned. This occurs so often that the Commission's Broadcast Bureau has a form letter that is used for this situation. Its letter to Intervenor contained in this record at R 54 conforms to that form. Identical letters were sent in the cases of KTSD(FM) (BMPH-7456) and WERX (BMP-11084), presently pending before the Commission, in both of which cases a permittee is simultaneously seeking Commission consent to assign its construction permit and an extension of time for its proposed assignee to construct the facilities after the assignment shall have been consummated.

Recent cases where the Commission has granted extensions of time which were requested in conjunction with assignment applications, solely to afford the proposed assignee time to construct the station, include WVCF, Apopka, Florida (BAP-628; BMP-10825) and KLUX, Baton Rouge, Louisiana, in which latter case not one but three different extensions were granted based on a proposed or pending application to assign the construction permit (BAP-601; BMP-10739, BMP-10371, BMP-10270).

In the instant case Intervenor had, on September 10, 1962, filed an application requesting Commission consent to assign its construction permit to one W. Courtney Evans (BAP-607) and, subsequently, on September 25, 1962, had filed an application requesting an extension of time for Evans to construct the station following consummation of the proposed

assignment. In light of the procedures referred to above, the Commission was acting completely in accordance with its established practices in entertaining this extension application; and it would have been acting in accordance with those practices had it granted the application for the reason given. The only departure from the established practice occurred when Intervenor elected, in January 1963, to terminate its contract with Evans and, instead, to take in Mr. Spilman as a minority stockholder and to proceed with the construction of the station itself.

The reasons for this change were shown to the Commission in Intervenor's "Opposition to Petition to Deny Applications" (R 74 et seq.) and stand unchallenged by Appellant. In that pleading Intervenor stated as follows:

> "9. ... the application to assign the Waynesboro construction permit to Evans was filed with the Commission in September, 1962, and remained pending, without favorable action, for over four months. To the best of the knowledge and belief of undersigned counsel, the delay was occasioned by questions relating solely to Evans, the proposed assignee, which questions were unresolved on January 10 and remain unresolved today [i.e., February, 1963]. Counsel reported these problems to the principals of [Intervenor], and also informed them that, as of the middle of January, there was no indication when or in what manner these questions would be resolved; and the principals of MPI determined at that time that they had no alternative but to terminate the contract. Although Mr. Rogers' continuing commitments to the National Symphony Orchestra would still make it impossible for him to devote significant time to the station, Mrs. Rogers (who had served as assistant manager and station manager of WGMS [Washington's Good Music Station] for a period of eight years) felt that she could assume the responsibility for putting the station on the air once she had completed her duties as President and General Manager of the Washington High Fidelity Music Show in early February of [1963], so it was decided that MPI would put the station on the air itself.

> "10. Almost simultaneously with this determination, a wholly unsolicited inquiry was received from Mr. Louis Spilman, Editor and Publisher of the News-Virginian of Waynesboro, and a leading citizen of the community, stating that he would be interested in discussing construction of the station with the owners of the franchise. Mr. Rogers met with Mr. Spilman [and the latter's participation in the venture ensued]... " (R 78, 79).

The pleading later continued:

> "11. ... At this point therefore, the instant extension is being requested not for the purpose of allowing the construction permit to be assigned but solely to give Mr. Rogers and his new local associate an opportunity to go forward with the construction of the station." (R 79) (Emphasis in original)

In KLUX (BMP-10371, supra) the permittee had, in requesting a second extension of time, stated that an assignment application would be filed shortly and that "The additional time is requested in order to permit Commission consideration of the said application and to afford the prospective new permittee sufficient time to take whatever action is necessary." In grating that application the Commission had made an implicit determination that that showing was sufficient and "proper" under Sec. 1.323(a) of its Rules. This being the case, it must a fortiori have been a "proper showing" when Intervenor showed the Commission that -- because of matters wholly beyond its control -- it was terminating its Agreement with Evans and would require additional time to construct the station itself.

The Commission's action was, therefore, wholly rational and consistent with its prior actions in similar cases and, perforce, clearly well within the limits of the discretion accorded it.

Both the statute (Sec. 319(b)) and the relevant sections of the Commission Rules recognize that the granting of an application for

extension of time is not really an independent licensing proceeding but is, primarily, an action ancillary to the granting of the original construction permit and one whose function is solely to implement that basic authorization; and it may well be that that is the reason why the Commission has exercised, and the Court has recognized, a broad discretion in these matters. In the Mass Communicators case, supra, the Commission had reinstated a construction permit, even though the application therefor had been filed three days after the last date provided by the Commission's Rule and even though there was co-pending an application by another party who sought to provide a service identical with that proposed by the permittee.

Here the extension application was filed before the expiration date of the construction permit and the only objection to the extension comes, not from another applicant seeking to provide an equivalent service to Waynesboro, but, rather, from the existing station in that community whose sole interest is to frustrate the institution of the new service that would destroy its local monopoly. Under these circumstances, the instant case presents an a fortiori situation for the exercise of the Commission's discretion under the rule of the Mass Communicators case as well.

II

THE MEMORANDUM OPINION AND ORDER HEREIN CONTAINS A VALID CONCLUSION BASED ON ACKNOWLEDGED FACTS AND IS LEGALLY SUFFICIENT.

In the Memorandum Opinion and Order here appealed from, the Commission dealt at length with those charges made by Appellant which sought

to raise questions of a transfer of control within Intervenor's corporate structure and of the propriety of the payment which Intervenor made to Williams. It dealt only briefly with the question of Intervenor's failure to complete construction in the past, but it did not, by any means, ignore that question.

In paragraph 7 of the Memorandum Opinion and Order (R 123), after reciting the background of the Evans contract and its termination and Mrs. Rogers' willingness to assume responsibility with respect to the station, the Commission flatly concluded that:

> "[No] lack of diligence [can] be imputed to [Intervenor] on the facts before us."

This conclusion was obviously based on the facts recited in the preceding paragraphs 5 through 7 of the Memorandum Opinion and Order relating to:

(1) Intervenor's first extension of time (which is not in issue in this proceeding) and which was held to have been granted for good cause shown.

(2) The reasons for not building prior to and during the pendency of the second extension application (i.e., Mr. Rogers' commitment to the National Symphony and the pendency of the proposed assignment to Evans).

(3) The termination of the Evans agreement and the proposal to have Mrs. Rogers assume responsibility for the Waynesboro station when she had acquitted her other responsibilities.

As noted above, the recitation of facts contained in paragraphs 4 through 7 of the Memorandum Opinion and Order (R 122-123) is little

different from the Statement of Case contained in Appellant's Brief. No "substantial or material question of fact is presented" between the facts as found by the Commission and as alleged by Appellant, such as might otherwise make a hearing appropriate.[1/2/] The conclusion that Intervenor was not guilty of lack of diligence was predicated on the facts as found. The requirements of Tri-State Broadcasting Co. v. FCC, and all other cases cited by Appellant at pages 20 through 22 of its Brief, have all been fully complied with.

Moreover, although the Commission made no specific finding with respect thereto, it had been advised by Intervenor in its "Opposition to Petition to Deny Applications" that:

> "MPI [had] acquired, through a subsidiary, the transmitter site designated in its construction permit and a studio lease. It [had] paid $1,500 down on said site..." (R 80)

Applicant did not challenge these allegations in its pleadings before the Commission, but in its Brief (pages 14 and 28) it refers to

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1/ This is not surprising when it is realized that the factual allegations contained in the "Petition to Deny" consisted entirely of a recitation of matters which were of record in the same Commission files from which the Commission drew the facts contained in its findings.

2/ Although Appellant claims a right to a hearing under Sec. 309 by virtue of having filed a "Petition to Deny" under Sec. 309(d), it is clear from Sec. 309(c)(2)(D) that such a petition does not lie against the instant application; and the Commission so determined in paragraph 2 of its Memorandum Opinion and Order (R 121). Assuming, arguendo, that any of the hearing provisions of Sec. 309 do apply, it could only be Sec. 309(e) and the Court would reverse the Commission and order a hearing only if the Commission had "abused its discretion" (Cf. Tomah-Mauston Broadcasting Co., Inc. v. FCC (1962) 113 U.S. App. D.C. 204, 206, 306 F.2d 811,) in determining that no "substantial and material question of fact [was] presented". (47 U.S.C. 309(e)).

events occurring after the entry of the Memorandum Opinion and Order here at issue (i.e., Intervenor's designation of a different antenna site and studio location) as "rais[ing] questions of possible misrepresentations." (Brief p. 28). However, the mere fact that Intervenor subsequently changed its plans and moved its site and studio location gives no reason to doubt the bona fides of the earlier representations which it had made with respect to those matters. And, since Appellant has seen fit to argue this point from facts which were not before the Commission at the time it took the action which is here under review, Intervenor here takes the liberty of representing to this Court (on the basis of the personal knowledge of undersigned counsel) that the arrangement for the original antenna site and studio were sufficiently concrete that Intervenor (through its subsidiary) suffered a loss of in excess of $2,400 in connection with that site and the studio lease when it abandoned them for the new combined transmitter site and studio location now designated. This loss consisted of the down payment originally made for the antenna site (which was not recouped), an additional payment made to the owner of the site in consideration for his accepting a reconveyance of the property and cancelling the deferred money mortgage, consideration paid for a release from the studio lease and associated expenses.

III

THE COMMISSION'S DISPOSITION OF APPELLANT'S OTHER CHARGES WAS WHOLLY CORRECT.

A.

The sale of stock to Mr. Spilman raised no problem affecting the public interest.

In passing on the other charges brought by Appellant, the Commission was, in each case, correct as a matter of law.

The contention that the sale of stock to Spilman represented an improper attempt to transfer to him control of the Intervenor corporation without Commission approval is wholly without basis. Intervenor reported its contract with Spilman to the Commission while it was still executory (see paragraph 12, "Opposition", R 80) and stated that the settlement would occur after approval of the then pending extension application. In a footnote on that same page, Intervenor pointed out to the Commission that, although it was filing no formal application for approval of the Agreement, the Commission did "have jurisdiction over this proposal by virtue of the pendency of the application for extension of time."

In its Statement of the Case (page 4 of its Brief) Appellant agrees that the Commission did have jurisdiction and even concedes that "In later granting the extension application ... the Commission, implicitly approved the transfers [of stock to Spilman]." Apparently, its only remaining complaint is that the Commission should not have granted that approval.

The Commission's determination in this matter, contained in paragraph 7, (R 123) of the Memorandum Opinion and Order, was:

> " ... there is no reason to believe that control would, in fact, devolve on Mr. Spilman. We therefore conclude that the proposed sale of stock to Spilman does not raise a bona fide transfer issue."

It is, of course, true that by this determination the Commission did, implicitly, approve Spilman's acquisition of stock in the Intervenor corporation, but there is no reason why it should not have.

The Commission found that control of the corporation would remain where it had been -- in the Rogers family; and that finding is amply supported by the evidence. It held that Spilman's acquisition of Intervenor's stock did not raise a question of undue concentration of control of communications media; and it was correct in that determination also.3/ Under these circumstances, no issues remained unresolved concerning Spilman's acquisition of stock.

B.

> Neither the payment to Williams nor any other aspect of the merger or Williams' subsequent withdrawal raises any question affecting the public interest.

On the question of the propriety of the payment to Williams the Memorandum Opinion and Order (paragraphs 9-12, R 124-126) is clear, unambiguous and legally unassaiable. Because the Act and the Commission's

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3/ The Commission has never held that local newspaper ownership in the same community is a disqualfying factor for a broadcast licensee. In a recent case it did make an inquiry concerning an application by the only newspaper in a community to acquire the only radio station in the community and raised, without determining, the question whether this would be in the public interest. WVIP (BTC 4197). However, footnote 4(a) of the Memorandum Opinion and Order at R 123 clearly distinguishes that situation from the instant case.

Rules did not specifically cover this situation, it was not clear before the entry of this particular Order that the Commission would require prior approval of payments such as the one Intervenor made to Williams, so nc opprobrium attaches to Intervenor for having paid Williams without having obtained prior approval from the Commission. More important, however, is the fact that, in its action herein, the Commission reviewed the whole question of the payment, applied to it the same tests that it would have applied if prior approval had been sought, and determined, on that basis, that it would have approved the payment if its approval had been sought in advance.

Unless this Court determines that the Commission is powerless to take action nunc pro tunc in matters that are otherwise fully within its jurisdiction, there is no oasis for it to overrule, or question, this aspect of the Commission's action.

Appellant seeks, by innuendo, to derive from the Williams matter factors that are not actually present. It notes (at page 3 of its Brief) that the Memorandum Opinion and Order of the Chief Hearing Examiner which approved the original agreement with Williams "ordered the Intervenor's application be amended to show that [Williams] held a 20% stock interest therein" and argues, at page 30 of its Brief, that this Order was subsequently "disregarded".

This is patently incorrect. The agreement between Intervenor and Williams which was before the Chief Hearing Examiner gave Williams an option to acquire a 20% interest in Intervenor's proposed facility. Pursuant to the Order of the Chief Hearing Examiner referred to above, Intervenor petitioned the Hearing Examiner for leave to amend its application

to reflect that Agreement after the Chief Hearing Examiner had approved it. Pursuant to that Petition, on April 17, 1961, Hearing Examiner Charles J. Frederick entered an Order in Dockets 13892, et al. (FCC 61M-679; 3552), paragraph 3 of which ordered that Intervenor's application be amended to:

> "incorporate therein a reference to the attached Agreement between Music Productions Incorporated and James J. Williams, dated February 23, 1961, marked Exhibit B."

At page 29 of its brief, Appellant urges an inconsistency between Intervenor's representation, made in connection with the merger agreement, that the merger would permit Mr. Williams to take an active part in the ownership and management of the proposed station and its subsequent representation that "the assignment [to Evans] was necessitated by virtue of other employment responsibilities of Intervenor's principal stockholder."

However, at paragraph 8 of its "Opposition to Petition to Deny Applications" (R 77), Intervenor had showed the Commission that:

> "Mr. Rogers, who was at the time [of the original merger] out of the country, had hoped that Mr. Williams would, as 'resident partner', take an active part in the operation of the proposed station. However, the Williams option was never exercised...."

Appellant takes issue (fn. p. 29) with the statement on the same page of Intervenor's "Opposition" that "no final disposition was required or was made with respect to Williams until the decision was made to assign the construction permit to Mr. Evans", but it is clear that, so long as Intervenor had no plans to transfer the construction permit or any interest therein to any other party, it could afford to leave the matter of Williams' option unresolved since Williams could only obtain his 20% interest by

tendering $1,000 for his stock and lending the corporation another $4,000.

At page 28 of its Brief, Appellant attacks the representation made to the Commission in 1961 that allowing Intervenor and Williams to merge would serve to "expedite the proceeding", although the fact is that, as a result of this merger, the parties and Commission were saved the year or more that is normally required to dispose of a hearing between multiple applicants involving the "standard comparative" issue.

On the same page of its Brief, Appellant refers to an Affidavit filed by Williams in the 1961 proceeding in which he stated that the "rights acquired under the merger constituted the 'sole consideration' for the merger." By coupling this reference with an allusion to "possible misrepresentations" made in the following paragraph, Appellant insinuates that, at the time they entered into the 1961 agreement, Intervenor and Williams had already agreed that the former would subsequently "buy out" the latter. Needless to say, there is absolutely nothing in the record to support this canard.

C.

The claim that the Commission should have reopened the matter of Intervenor's original grant and allowed new applicants to apply for the facility is without merit or precedent.

Finally, we come to Appellant's contention that the Commission, instead of approving Intervenor's extension application, should have ordered a new hearing to determine whether the public interest might have

preferred some other applicant for the facility involved -- either at Waynesboro or some other community.

This involves two separate questions:

1. Whether the Commission should have re-opened the proceeding for other applicants for Waynesboro, and

2. Whether it should have re-opened the proceeding for applicants for communities other than Waynesboro. 4/

One answer, applicable to both questions, is that, where the Commission's action in an adjudicatory proceeding such as this 5/ has been allowed to become final, neither the Commission nor the Court has ever found it appropriate to re-open the proceeding to entertain new or reinstated applications for the same facility except where there has been a determination that the original proceeding was voidable or void because of fraud or other abuse of process involved in obtaining the original authorization.

See Rhode Island Television Co., et al., v. FCC, (1963) U.S. App. D.C., Cases Nos. 17255, 17256, where Appellant sought to attack collaterally the Intervenor's basic construction permit on the grounds that there had been "so substantial a modification of WTEV's license that Rhode Island, a party desiring to apply for comparative consideration,....must be allowed comparative consideration at this time"

4/ It will be remembered that Intervenor had obtained the dismissal of three competing applications. Two of them (one of which was the Williams application) were applications for identical facilities at Waynesboro. The third was an application for the community of Luray, Va.

5/ Intervenor's original construction permit was, of course, granted after a full adjudicatory proceeding held pursuant to the Administrative Procedures Act. Docket 13892, et al.

but the Court found such an argument wholly groundless. And compare City of Jacksonville, 20 Pike & Fischer RR 1087, where, because of revelations of possible abuses of its processes, the Commission on its own motion ordered the record in an adjudicatory proceeding reopened years after its original grant had become final, with Belleville News Democrat, 8 Pike & Fischer RR 374, 379, where it refused to re-open such a record after the statutory period for reconsideration had run, giving as its reason that the party seeking such relief had "stated no case of 'fraud' ..."

In this connection it should, of course, be noted that, although Appellant has charged wrongdoing on the part of the Intervenor in many other areas, it has nowhere claimed that Intervenor's original construction permit was invalidly obtained.

Another consideration, applicable to the second question referred to above, relates to Sec. 1.316(b)(1) of the Commission Rules, which Appellant seeks to invoke on pages 27-28 of its Brief, even though it admits that that section had not been promulgated at the time Intervenor received its original grant.

The only authority for applying the policy of this section of the Rules retroactively to agreements made before it was adopted is found in the Commission's Memorandum Opinion and Order in Radio Americana Inc. (Docket No. 13245), adopted and announced December 11, 1963. Even in this case, however, the construction permit had never become finalized; and the Commission action, re-opening the case for other applicants to apply or re-apply for the same communities for which applications had been filed in the original proceeding, resulted ultimately from a Petition

for Reconsideration directed against the Radio Americana grant before the grant had become final (see Radio Americana, Inc. 21 Pike & Fischer RR 702) and not from a collateral attack such as is here involved.

Moreover, what is probably of more importance from a substantive point of view is the fact that, even if the Commission were to re-examine the Agreement between Intervenor and the Luray applicant in the light of the objectives of Sec. 1.316(b)(1), it could not possibly find, in the words of that section, that

> "the withdrawal of [the Luray] application... would unduly impede achievement of a fair, efficient and equitable radio service among the several states and communities..."

and would not, therefore, have any reason to afford any other person an opportunity to apply for Luray and to order a rehearing between Intervenor and such an applicant.

In its Memorandum Opinion and Order herein (paragraph 8, R 123) the Commission took official notice that the 1960 population of Luray was only 2,999 compared to Waynesboro's population of 15,753 and that each community already had one station. Under these circumstances it is clear that the provision of a second local service for Waynesboro would have to be preferred under Sec. 307(b) of the Communications Act over a second local service for Luray; and that the withdrawal of the Luray application advanced, rather than impeded the achievement of the "fair, efficient and equitable distribution of radio service" which is sought by both Sec. 307(b) of the statute and Sec. 1.316(b)(1) of the Commission's Rules.

For all the foregoing reasons, it is clear that the Commission

was under no obligation whatsoever to hold a new hearing to reconsider the grant of Intervenor's original authorization; and, indeed, such a proceeding, under the circumstances of this particular case, would have been wholly without precedent.

CONCLUSION

Each of Appellant's arguments having been shown to be without merit, there is no reason why the Court should disturb the reasonable and proper action which the Commission took in the instant case in the exercise of its acknowledged discretion; and that action should, therefore, be affirmed.

Respectfully submitted,

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December 16, 1963